At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of February, 2021.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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BRITTANY HOSTMAN,
Plaintiffs,

- against -

Index No. 521165/17

M.S. 1 & 2

JPW INDUSTRIES, INC. D/B/A POWERMATIC TOOL, PRATT INSTITUTE, ROBYN MIERZWA D/B/A MAKEVILLE STUDIO, LLC AND MAKEVILLE STUDIO , LLC.
Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.[1]
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	20-33, 34-40
Opposing Affidavits (Affirmations)	41-55, 56-63
Reply Affidavits (Affirmations)	64, 65

Upon the foregoing e-filed papers, defendant Pratt Institute (Pratt) moves, in motion sequence (mot. seq.) one, for an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint of plaintiff Brittany Hostman (plaintiff) and all cross claims asserted against it. Defendants Robyn Mierzwa (Mierzwa) d/b/a Makeville

[1]New York State Court Electronic Filing Document Numbers

Studio, LLC and Makeville Studio, LLC (Makeville or the studio) move, in mot. seq. two, for an order, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint and all cross claims asserted against them.

Overview

This is a lawsuit for personal injuries arising out of an accident that occurred on March 31, 2017 when plaintiff, a 22-year-old Pratt student, sustained three amputated fingers while using a Powermatic HH jointer, a woodworking power machine used to make pieces of wood perfectly flat. The accident occurred while plaintiff was taking an independent study course in woodworking at Makeville, a woodworking studio located in Brooklyn, New York, in connection with the degree she was pursuing at Pratt.[2] The claim against Pratt sounds in negligence and the claims against Makeville sounds in negligence, product liability, and breach of warranty.

Background Facts and Procedural History

In April, 2016, while plaintiff was still attending Pratt, a dispute arose between plaintiff and Pratt regarding plaintiff's use of a service dog on the Pratt campus (NYSCEF Doc No. 28 at 70). Thereafter, plaintiff filed a complaint with the United States Department of Education, Office for Civil Rights (OCR) against Pratt (NYSCEF Doc No. 25). As a result, plaintiff and Pratt entered into an Early Complaint Resolution

[2]Plaintiff was a matriculated student at Pratt from Fall 2013 to Spring 2017 and graduated in June 2017 with a Bachelor of Fine Arts in Ceramics with honors (NYSCEF Doc No. 24).

Agreement (OCR Agreement) to resolve plaintiff's complaint (*id.*).

The agreement provided, in relevant part, that for the academic year 2016-2017, Pratt would "identify an off-campus studio space(s) in order for [plaintiff] to complete . . . an independent study course in woodworking during the fall 2016 semester" (*id.* at ¶ 3), and that Pratt would provide plaintiff "with comparable classroom instruction such as that provided to students working in the on-campus studios, and evaluate her artwork, notwithstanding her participation at an off-campus studio" (*id.* at ¶ 4). Pratt also agreed to pay for plaintiff's use of the off-campus studio space directly to the owner/manager of the off-campus studio during the Fall 2016 semester and Spring 2017 semester (*id.* at ¶ 3); that "any off-campus studio space(s) it identifie[d] for [plaintiff would] provide [her] with the appropriate equipment and available amenities necessary to complete any assignments for her studio courses and/or independent study courses (*id.*)"; that the off-campus studio space would be wheelchair accessible to plaintiff (*id.*); that if plaintiff "independently identifie[d] and secure[d] off-campus studio space(s)" during the academic year 2016-2017 "that contain[ed] the appropriate equipment and available amenities, and [were] preferable to the off-campus studio space(s) identified by [Pratt] . . . [Pratt] [would] provide payment for such studio space(s) . . . " (*id.* at 3); and that Pratt would "provide payment for [plaintiff's] transportation to and from the identified off-campus studio space(s) via car service/taxi for the duration of academic year 2016-2017 . . . " (*id.*).

In the Fall of 2016, Marie McLaughlin, Assistant to the Director of the Learning Access Center at Pratt (NYSDEF Doc No. 31 at 9), called approximately five woodshops to identify studio spaces/woodshops in the area for plaintiff that were accepting new members and which were also wheelchair accessible (*id.* at 17-18). According to Ms. McLaughlin, plaintiff had the ultimate decision-making power as to which woodshop would be chosen (*id.* at 18). Ms. McLaughlin gave plaintiff Makeville's contact information and the information for another wood shop (*id.* at 19).

In December of 2016, plaintiff visited Makeville alone (NYSCEF Doc No. 29 at 24-25). No one from Pratt offered to accompany her (NYSDEF Doc No. 31 at 22). The studio was a woodworking community shop but also taught classes (NYSCEF Doc No. 29 at 14). During the visit, plaintiff inquired of owner Ms. Robyn Mierzwa about becoming a member of the shop. Plaintiff told Mierzwa that there had been an issue with her service dog at Pratt, and that she wanted to find an alternate space where she could complete her course work (NYSCEF Doc No. 29 at 25). Ms. Mierzwa told plaintiff that in order to become a member of the shop, she would have to pass a "workshop certification," which was a "safety assessment" and "skills assessment" that the studio "put people through before they [could] use the shop" (*id.* at 16-17, 25-26). Ms. Mierzwa also told plaintiff that if she were doing course work she would probably want to have her instructor with her (*id.* at 26). However, having plaintiff's instructor present at the studio with her was voluntary and not a prerequisite to plaintiff's use of the studio (*id.* at 32).

Ms. Mierzwa characterized the workshop certification as a "test" which either she or her "shop techs" administered (*id.* at 18). Shop techs or shop monitors were individuals at the studio who performed instruction, administered the test, and taught classes in exchange for the right to use the studio (*id.* at 18-21, 70).

The workshop certification was an hour-long "machine by machine checklist, questions and demonstrations that each participant must answer" which "test[s] [his or her] knowledge of the machine set up, safety and basic techniques" (*id.* at 99, 98). The workshop certification testing was done on all large stationary machines, which included the jointer, the planer, the drill press, the table saw, the band saw and routers, and the router table (*id.* at 102). According to Ms. Mierzwa, "[e]ach of the modules for the machine are pass fail . . . [i]f someone does not pass on the machine, they are not allowed to use the machine" (*id.* at 100). Thus, an individual could not use the shop without first taking and passing the workshop certification (*id.* at 18). Further, if plaintiff had failed the section of the test about the jointer, she would not have been allowed to use the jointer (*id.* at 100).

Plaintiff ultimately chose Makeville as her wheelchair accessible off-campus woodshop (NYSCEF Doc No. 31 at 22). Steven Bennett, a studio shop tech, administered the workshop certification to plaintiff in late December 2016 or early January 2017 (NYSCEF Doc No. 29 at 30). Plaintiff passed all portions of the workshop

certification, and was allowed to become a member of the studio (*id.* at 31, 100-101).[3] After plaintiff passed the workshop certification, she read and then signed a release entitled "Assumption of Risk and Release Of All Liabilities, Claims and Injuries" (NYSCEF Doc No. 28 at 160-161, NYSCEF Doc No. 39). Plaintiff then contacted Pratt, which, in turn, contacted Ms. Mierzwa (*id.* at 28). Pratt paid Ms. Mierzwa for the certification fee ($100), and Ms. Mierzwa then set up the monthly membership fee payment ($400) for plaintiff's use of the studio (NYSCEF Doc No. 29 at 29). Other than the payment of the membership fee there was no other agreement between the studio and Pratt with respect to plaintiff's use of the studio (*id.* at 124), nor did Pratt have any additional contact with Ms. Mierzwa (*id.* at 26-27).

According to Ms. Mierzwa, there was a difference between an individual who was a member at the studio and an individual who was taking classes there - someone taking classes was not a member (*id.* at 126). A member, however, performed the workshop certification, but the member did not receive any instruction from studio employees,

[3]Plaintiff testified that a studio instructor named Steven performed a "shop orientation or shop safety portion of a class," as well as playing a role with respect to her "initial access to use" the studio (NYSCEF Doc No. 28 at 80). Steven also trained her on how to use the jointer (*id.* at 84). In this regard, she was shown the push sticks, and how far to adjust the "fence" (similar to a back splash on a kitchen counter, which was approximately three inches tall, and was perpendicular to and rested on the jointer infeed and outfeed tables) (*id.* at 85) (*see infra* for description of jointer). The studio also covered safety with regard to use of the jointer, including not to mill a piece of wood that is too small or too thin and to be careful about wood that is too wide, and will not fit across the "cutterhead" - the group of blades on the jointer that spin to make the piece of wood being milled perfectly flat (*id.* at 85-87). It is unclear whether this instruction was part of the workshop certification.

studio independent contractors, or other studio individuals about woodworking or how to use equipment in the shop (*id.*). In this regard, plaintiff's membership at the studio entitled her to access to the machines she had been certified on as well as access to work benches and storage spaces (*id.* at 127). During plaintiff's attendance at the studio, she did not take any classes (*id.* at 129).

Ms. Mierzwa testified that new members were told that if a machine malfunctioned on the shop floor, the shop rule was to report any unusual or unexpected behavior on the machines (*id.* at 106). According to Mierzwa, the shop techs/monitors at the studio were there to monitor the shop, not to monitor the people working there (*id.* at 70).

Once plaintiff began her course work at the studio, she met with her professor, Yasu, once a week or every two weeks (NYSCEF Doc No. 28 at 81-82) i.e. approximately three to four times before her accident (*id.* at 146). The first time plaintiff worked at the studio Yasu was also present. After that first meeting, it was up to plaintiff to schedule the times she would be in the studio (*id.* at 145). When plaintiff met with Yasu, she would have specific questions about the pieces that she was working on and Yasu would give her guidance on making an element (*id.* at 144-145). However, plaintiff was solely responsible for fabricating the pieces (*id.* at 147). Yasu was never present when plaintiff fabricated her pieces because during his meetings with plaintiff he only stayed at the studio for an hour or so (*id.*). Further, before she began her independent

study at the studio, Yasu did not give plaintiff any safety instruction, nor did Pratt give her a shop orientation (*id.* at 82). When plaintiff began using the studio, it was Ms. Mierzwa's understanding that an instructor from Pratt would be there frequently with plaintiff (NYSCEF Doc No. 29 at 37). On one occasion, Ms. Mierzwa observed a male instructor who accompanied plaintiff at the studio (*id.* at 38).

As part of plaintiff's independent study at the studio, she was using a jointer (NYSCEF Doc No. 29-30). Plaintiff's expert, Mr. Winter, provides a description of a jointer as follows:

> "A jointer is a woodworking machine whose function is to straighten an edge or face of a board by shaving down the high spots to be even with the low spots thereby yielding a straight surface. The machine consists of an infeed table to the operator's right, an outfeed table to the operator's left, a centrally located cutter head, a cutter head guard, and a fence. The cutter head is rotated at high speed by an electric motor.
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> "In use, the operator places the workpiece on the infeed table and pushes the board to the left. The leading end of the board contacts the guard and pushes it open as the board continues to be fed to the left by the operator. Next the board encounters the cutter head, which shaves the bottom surface of the board smooth and even. As the board exits the cut, the guard swings closed under spring pressure, covering the cutter head.
>
> "The guard is mounted on a vertical shaft and can rotate horizontally relative to the shaft. The shaft, in turn, is mounted in a hole of a casting adjacent to the infeed table. A horizontal set screw is threaded through the casting. It bears

> on the side of the shaft and immobilizes it. So long as the set screw is adequately tightened, the shaft cannot move. If the set screw becomes loose, the shaft may slip down in the hole, thereby lowering the guard onto the infeed table" (NYSCEF Doc No. 46 at 3-4).

Mr. Micah Coleman, Vice President of Product and Engineering at JPW, testified with respect to certain aspects of the Powermatic 60HH Jointer, the subject jointer used by plaintiff at the studio. With respect to the blade guard (i.e. the cutterguard), he testified that:

> "[t]he guard keeps the cutter head covered until the . . . piece of wood, is engaged with it. The process of feeding the work piece over the cutter head will push the guard out of position. It is on a spring-loaded and return position so that the cutter head is reasonably covered with either the guard or the work piece" (NYSCEF Doc No. 62 at 30)

The guard is made of metal and weighs less than 20 pounds (*id.* at 31-32). When a kickback occurs, and the wood work is removed from the machine, the guard will swing back to cover the cutterhead (*id.* at 33-34). When the machine is properly set up, the guard contacts "the fence" and covers the cutterblade (*id.* at 34). When asked to describe the procedure used to attach the guard to the machine, Mr. Coleman read from the jointer's instruction manual, which stated, in relevant part, that the guard is mounted on an axle and that when properly installed should "snap back to the fence" and "must operate freely" and "must not drag on the rabbeting[4] ledge or the infeed table" (*id.* at 36-37). He further testified that if such dragging still occurs, the "set screw" must be

[4]The process of rabbeting is when a deep notch is formed in or near one edge of a board so that something else can be fitted into it (Dictionary.com).

checked to ensure that it is tight and, if that does not resolve the issue, the guard assembly may need adjustment or replacement (*id.* at 37). Finally, Mr. Coleman was asked "if [a] user was using a machine and the guard was pivoted out to allow a piece of wood to clear the cutter head, do you know of any reason that the guard would catch on the edge of the out-feed table?" to which he responded that he would assume that the machine had not been set up properly (*id.* at 54).

Plaintiff testified similarly with respect to the description of the jointer. According to plaintiff, "[a] jointer is for taking a piece of wood that may not be perfectly flat and milling the edge so that it is perfectly flat" (NYSCEF Doc No. 28 at 86). The jointer contains a cutterhead, which is a group of blades that spin to remove material from a board which is being milled on the jointer (NYSCEF Doc No. 28 at 87). "The blades are mounted to a cylinder at the bottom of the table . . . [w]hen the wood is run over . . . the blades[,] [the blades] shave[] off the parts [of the wood] that touch the blade[s] until they all touch the blade, and then the wood is flat" (*id.* at 88). The cylinder and the blades are level with the top of the table of the jointer (*id.* at 88-89). There is an infeed table and an outfeed table - the infeed table is raised and lowered, depending on how much wood the user wants to take off (*id.* at 89).[5] Plaintiff understood where the cutter blades were located on the jointer prior to her accident (*id.* at 87-88).

[5]Plaintiff further testified that the blades have to be exposed in order to make contact with the piece of wood being milled - namely if a person wanted to remove some part of a piece of wood using a jointer, the blades have to be able to contact the piece of wood (*id.* at 89-90). She also testified that the blade is fixed (i.e. constructed) to be level with the outfeed table (*id.* at 89).

Plaintiff had used the jointer at the studio four to six times before the accident (*id.* at 50). While growing up, and before attending Pratt, plaintiff understood that power tools could be dangerous if they were misused (*id.* at 32). Plaintiff was aware of this because her grandfather had power tools including a table saw, band saw, a planter, a jointer and a drill press, but she was never allowed to use them (*id.* at 32, 30-31). Plaintiff had taken shop classes at Pratt when she was enrolled in Woodworking I in 2014 or 2015 (*id.* at 32-33). That class included a unit on shop safety with written materials specifically devoted to shop safety (*id.* at 34) as well as a test on the subject (*id.* at 34-35). As part of the class, plaintiff also received a shop orientation manual (*id.* at 35), which included information about machine safety (*id.*). The manual also stated that different machines in shop class could be hazardous if certain safety rules were not followed (*id.* at 35-36). In the shop orientation safety class, plaintiff was trained to use the jointer (*id.* at 39). However, the shop orientation safety class covered jointers only "partially" in that students were not permitted to use them because, as plaintiff assumed, they were too dangerous (*id.*). If the students needed to use the jointer, they had to find a Pratt employee to use it for them (*id.* at 37). Instead of actually using the jointer, the students were trained on it by using a "checklist" (*id.* at 39-40). The class made clear that machines, including jointers, were dangerous when they were used carelessly, and that lack of care and attention while using them could cause serious injury (*id.* at 40-41). Plaintiff understood that serious injury while using these machines could include injury to

hands or limbs including amputations (*id.* 41).

There was only one jointer at the studio (*id.* at 78-79). The studio had purchased the jointer in September, 2016 and it had been in use there for approximately seven months before the date of the accident (NYSCEF Doc No. 29 at 42). When the jointer arrived, Ms. Mierzwa inspected it by checking to see if the blades needed to be replaced, (they did not), and by performing "[b]asic electrical testing," namely "plugging the machine in, turning it on, and checking the switch" (*id.* at 43). Further, when Ms. Mierzwa turned the machine on and off, it went on and off (*id.* at 43-44). She also confirmed that the infeed and outfeed tables were parallel (*id.* at 45), that the "fence" on the jointer did not need to be adjusted (*id.* at 45), and she testified that all were in good working order (*id.*). She also checked to see that the cutterguard was operational, meaning that it would "bounce back" after a piece of wood was passed through, and that the spring tension did not need to be adjusted (*id.* at 46). In addition, she checked the "set-screw" that "goes into the shaft of the guard" for tightness (*id.* at 46-47). There were no problems with the cutterguard, the spring tension, or the set screw on the jointer from its arrival until the time of the accident (*id.* at 47). No one had ever reported to her that the [cutter]guard was sticking against the edge of the table as opposed to snapping back into place, she had never seen that happen, and she did not think it was possible (*id.* at 47-48). From the time the jointer was placed in the studio until the day of the accident, there had been no issue about the on/off switch working properly. Further, she had never heard

of the jointer turning back on after someone had turned the machine off with the on/off switch (*id.* at 49). However, she was present when plaintiff's expert tested the jointer, where she observed that "[w]hen you pressed the off button it [the jointer] would go off, but as soon as you released it [the jointer] would come back on, which was not normal" (*id.* at 50). Ms. Mierzwa stated that she did not test the on/off switch on the date of the accident or "at any time leading up to date of the accident" (*id.* at 51). She also testified that she performed various maintenance and inspections on the jointer during the seven months that the machine was in the studio before the accident occurred (*id.* at 57-61).

Plaintiff had been at the studio for approximately one hour before her accident occurred, reviewing her plans to see what pieces needed to be fabricated (NYSCEF Doc No. 28 at 92, 93-94). Plaintiff began milling a piece of wood of white oak approximately four or five feet long, six to eight inches wide and a little over an inch thick, which did not contain any defects (*id.* at 95-96). However, after making at least two or three passes of the wood on the jointer (*id.* at 97), plaintiff's hand came in contact with the "blades" of the jointer (*id.* at 100). Specifically, plaintiff testified that the guard (i.e. the cutterguard) for the cutterhead (i.e. the "blade[s]") had tilted out of axis and was stopped by the infeed near the outfeed table, so she had to lift the cutterguard so that the cutterguard would go back over the "blade[s]" (i.e. cutterhead) (*id.* at 100-101). She explained that when the machine is working properly, as the operator is feeding the piece of wood through the jointer over the "blade heads," the cutterguard pivots away from the

"blade heads" and allows the work piece (i.e. the wood) to go through the cutterhead (*id.* at 103). "The cutterhead is the blade itself," and "the [cutter]guard is what covers the blade" (*id.* at 102), namely, it is like a solid piece of metal that is affixed to the table of the jointer by a pivot (*id.* at 103). Therefore, when a piece of wood is pushed all the way through the jointer, the spring on the pivot should move the cutterguard back into place (*id.* at 104). However, when plaintiff's accident occurred, the cutterguard did not move back into place. Specifically, just prior to her accident, plaintiff had been attempting another pass with the piece of wood and the wood kicked back and ejected out, meaning there was no wood on the jointer (*id.* at 105-106).[6] According to plaintiff, "[t]he guard [i.e. the cutterguard] for the cutterhead [i.e. the blades] had tilted out of axis[7] and was stopped by the infeed near the outfeed table" (*id.* at 100-102). When plaintiff was asked what she meant by the cutterguard tilting out of axis, she stated that: "[t]he cutterhead is designed to move horizontally . . . away from and over the blade when it [the blade] is not being used" (101-102). However, "when it [the cutterguard] had opened fully, it had somehow dipped below the table and was snagged . . . [a]nd the spring inside the mechanism that keeps it [the cutterguard] closed was not able to move it up to get back over the blade" (101-102). In this regard, plaintiff testified that "the spring would have worked but the guard itself, the piece of metal that is the guard, had been tilted where it

[6]Ms. Mierzwa testified that a "kickback" is when "wood gets pushed back in the feed direction of the cutter[ ]head when an operator doesn't hold it in place" (61).
[7]She assumed the guard tilted out of axis because the guard was loose (*id.* at101).

was obstructed by the outfeed table" which prevented the guard from returning back over the blade (104). Essentially, the cutterguard had tilted so that it was obstructed by the outfeed table (or the cutterguard snagged on the outfeed table) and had not snapped back into place over the cutterhead (104-107).

Plaintiff then turned off the jointer. After that, with her left hand, she tried to close the cutterguard by manually taking the edge of the cutterguard that was farthest away from the cutterhead and lifting it vertically to free it from the outfeed table (*id.* at 107). However, as she lifted the cutterguard, the spring that was designed to self-close the cutterguard was stronger than she had anticipated and it (the spring) pulled her hand into the cutterhead (*id.* at 108), which "pulverized" and "immediately amputated" three of her fingers on her left hand (*id.* at 112-113). Plaintiff's left hand then became free from the cutterguard because "[t]here was nothing left [of her hand] holding onto the guard" (*id.* at 112), i.e. once the cutterguard snapped back into place plaintiff's hand became free (*id.* at 113-114). Paramedics arrived and transported plaintiff to the hospital (*id.* at 115-116). Plaintiff had never had an issue with the cutterguard not coming back into place during her prior uses of the jointer, nor did she know anyone else who had this issue (*id.*).

As noted above, plaintiff first testified that at the time of the accident, the jointer was off (*id.* at 108). Further, she testified that she did not think that the jointer ever turned on when her hand was near the cutterhead (*id.* at 111-112), and that she did not know whether it was the blades (i.e. the cutterhead) or the movement of the cutterguard

that caused her injury, but assumed it was the cutterhead because that was the only thing sharp enough to do so (*id.* at 113).

Later during her deposition, plaintiff testified that during her accident, she had pushed the stop/off button on the jointer and assumed the machine had stopped running (*id.* at 166-167), but did not know if the jointer had been running at the time of her accident (*id.* at 167). Plaintiff testified that on one occasion, when she first started working at the studio, she had pushed the "stop" or "off" button on the jointer but the jointer did not stop (*id.* at 164-165). She was told by one of the shop techs at the studio that she had not pressed the off button long enough, namely that "it needed a long press" (*id.*). Thereafter, when she pressed the button long enough, the jointer had stopped (*id.* at 165). She further testified that she believed the blades were turning during her accident but did not recall whether she had actually seen the blades turning at that time (*id.* at 167). Plaintiff did not tell anyone at the studio about the problem with the jointer before trying to fix it herself because she did not want to leave with the blade exposed (*id.* at 108-109).

After the accident, shop tech Steve Bennett and two other shop techs told Ms. Mierzwa that plaintiff had told them that her hand had come in contact with the cutterhead when she was attempting to free her headphone cord that had gotten caught on the blades (NYSCEF Doc No. 29 at 67- 69). However, Mierzwa did not know of anyone who had witnessed the accident and there was no one near the subject jointer when the accident occurred (*id.* at 62). Plaintiff testified that she was listening to music via her

smart phone when the accident occurred but that her phone was in her back pocket and the headphone ran inside her shirt (NYSCEF Doc No. 28 at 99).

On or about March 31, 2017, plaintiff commenced the instant action by filing a summons and complaint, naming JPW Industries, Inc. (JPW), the manufacturer of the jointer; Mierzwa and Makeville, the studio; and Pratt. Between December, 2017 and February, 2018, defendants joined issue with each serving its respective answer to the complaint. After discovery was complete, the parties filed the above-noted motions, which are presently before the court for disposition.

Arguments

In support of its motion for summary judgment, Pratt first argues that it does not owe plaintiff a duty of care on the grounds that it did not own or operate the studio where the accident occurred, the accident was not caused by its staff or equipment, and it was "not involved in plaintiff's accident in any way," except for paying the studio for the certification workshop and the monthly membership fee. To the extent plaintiff argues that Pratt negligently placed her at the studio, Pratt contends it is an overzealous attempt to create a duty where none legally exists. In addition, Pratt asserts that it cannot be held liable for plaintiff's accident because it did not have any special relationship with Makeville, such that it had a duty to control Makeville's conduct. In this regard, Pratt reiterates, as noted above, that it did not own, operate, manage or control the studio, and only paid Makeville for the certification workshop and plaintiff's monthly membership

fee. In addition, Pratt argues that given plaintiff's age of majority and appreciation of potential harm from the jointer, under the doctrine of in loco parentis, it had no duty to supervise plaintiff while she was at the studio.

In support of its own motion, Makeville argues that it is entitled to dismissal of the complaint based upon the release plaintiff signed as well as plaintiff's awareness of the potential dangers associated with the jointer. Further, Makeville asserts it cannot be held liable for plaintiff's injuries because it had no notice of any purported defect. Finally, Makeville asserts that plaintiff assumed the risk of injury because she attempted to manually repair the cutterguard without first seeking assistance from the Makeville staff.

In opposition to Pratt's motion, plaintiff argues that Pratt owed her a duty to take reasonable precautions to ensure her safety at the studio because it not only encouraged but mandated that she participate in required course work over which it had sufficient control. Plaintiff also asserts that Pratt breached this duty by subjecting her to an unreasonable risk of harm of which Pratt was or should have been aware and/or by failing to take reasonable precautions for her safety. Stated otherwise, plaintiff contends that Pratt breached its duty to provide her with an off-campus woodworking facility that was free from unreasonable risk of harm and that was comparable to its "on-campus woodworking facilities that were approved and sanctioned by Pratt as part of its formal degree curriculum" (NYSCEF Doc No. 41 at ¶55). In particular, plaintiff argues that Pratt breached its duty to train, supervise and instruct her by identifying an off-campus

facility that had different standards than Pratt's own facilities, namely it allowed her to use the jointer that caused her accident; it failed to provide a Pratt instructor who regularly supervised her and gave her safety instructions before she started her independent study; it failed to communicate with the studio except with respect to payment; and it permitted coordination with the studio by Pratt personnel who had no experience with the inherently dangerous field of woodworking. Finally, based on the record, her expert's affidavit, and her engineer's report, plaintiff argues that Pratt's breach of its duties was a proximate cause of her injuries.

In opposition to Makeville's motion, plaintiff argues that the release she signed is void against public policy pursuant to General Obligations Law § 5-326 because a fee was paid to the studio and the studio is "recreational in nature." Alternatively, plaintiff asserts that a triable issue of fact exists as to whether the release required her to assume the risks in connection with a machine which was allegedly defective before and at the time of the accident (NYSCEF Doc No. 56 at ¶ 60). Stated otherwise, plaintiff asserts that a triable issue of fact exists as to whether, by signing the release, she assumed "concealed or unreasonably increased risks" (*Serin v Soulcycle Holdings, LLC*, 145 AD3d 468, 469 [1st Dept 2016]), and whether products liability and negligent design claims "were within the intendment of the parties" when the release was signed (*Blog v Sports Car Club of Am.*, 254 AD2d 65, 66 [1st Dept 1998], *lv dismissed in part, lv denied in part* 95 NY2d 954 [2000]).

Plaintiff next asserts that even though the release purports to absolve Makeville of its own negligence, the complaint also contains causes of action that sound in products liability and defective product design. Thus, given the report of her second expert that the of assumption of risk because it did not raise this argument in its moving papers nor did it assert this claim as an affirmative defense in its answer. In any event, plaintiff contends the doctrine doe jointer was not functioning properly, plaintiff argues that a triable issue of fact also exists as to whether the risk of faulty equipment or failure to furnish essential equipment was within the contemplation of the parties at the time the release was executed.

Lastly, plaintiff argues that Makeville cannot rely upon the doctrine of assumption of the risk as it does not apply to "unassumed, concealed or unreasonably increased risks" (i.e. the faulty set screw, the defective on/off button, and the studio's failure to determine her level of experience with the jointer) or where, like here, the equipment or product involved is defective (i.e. a faulty set screw and a defective on/off button).

In reply, Pratt reiterates that it does not owe plaintiff a duty of care where, in New York, the doctrine of in loco parentis at the college level has been rejected. In this regard, Pratt asserts that it did not undertake a sufficient level of control over plaintiff's participation at the studio in order to create a legal duty to ensure her safety. Specifically, Pratt argues that it neither encouraged nor required plaintiff to participate in an independent study course using an off-campus woodworking studio because plaintiff's

participation was based upon the mutually-agreed upon terms of the OCR agreement, and because plaintiff had the ultimate decisionmaking power as to which workshop would be chosen.

Pratt also argues that having only paid for the "certification workshop" and monthly membership fee, it had no legal relationship with the studio which created a legal duty to plaintiff, namely, it had no duty to control the studio's conduct. Pratt also contends that given plaintiff's description of the accident (i.e. that it was caused by a defect in the jointer, over which it had no control), plaintiff's "placement" at the studio and the purported "requirement" for her to perform her course work there cannot be considered acts or omissions which caused her to lift the cutterguard and become injured. In this regard, Pratt contends that the only valid causation issue is whether plaintiff was adequately warned about the specific dangers of putting her hand "into a particular area of the subject jointer" (NYSCEF Doc No. 64 at ¶ 8); that a "products liability duty to warn" does not extend to a university like itself; and that in any event, plaintiff was fully aware of the risks of placing her hand into the jointer but did it anyway. Thus, Pratt contends that its acts or omissions were not the proximate cause of plaintiff's accident.

In its own reply, Makeville argues that the release plaintiff signed is not barred by General Obligations Law § 5-326 because plaintiff used the studio solely in connection with her course work, which was not recreational in nature. Further, Makeville asserts that plaintiff has failed to raise an issue of fact as to whether it had prior notice of any

defective condition of the jointer.

Pratt's Motion

"To prevail on a cause of action alleging negligence, a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages" (*Pasquaretto v Long Is. Univ.*, 106 AD3d 794, 795 [2d Dept 2013]). Further, "[t]he existence of a legal duty presents a question of law for the court" (*id.*). "'Absent a duty of care, there is no breach, and without breach there can be no liability'" (*id.*, quoting *Fox v Marshall*, 88 AD3d 131, 135 [2011], citing *Pulka v Edelman*, 40 NY2d 781, 782 [1976]). As relevant here, "'New York has affirmatively rejected the doctrine of in loco parentis at the college level and colleges "in general have no legal duty to shield their students from the dangerous activity of other students"'" (*id.*, quoting *Luina v Katharine Gibbs School N.Y., Inc.*, 37 AD3d 555, 556 [2007], quoting *Eiseman v State of New York*, 70 NY2d 175, 190 [1987]). However, "[a] duty . . . may be imposed upon a college where it has encouraged its students to participate in an activity and taken affirmative steps to supervise and control the activity" (*id.* at 796, citing *Hores v Sargent*, 230 AD2d 712, 712 [2d Dept 1996]).

Pratt has failed to make a prima facie showing that it did not possess a sufficient degree of control over plaintiff's performance of the subject woodworking class at the studio to be charged with a duty of care to plaintiff (*see Hores*, 230 AD2d 712). First, pursuant to the OCR agreement, Pratt agreed to identify "an off-campus studio space[] in

order for [plaintiff] to complete . . . an independent study course in woodworking . . . " (*id.* at ¶ 3). In this regard, Ms. McLaughlin, the Assistant to the Director of the Learning Access Center at Pratt testified that she was responsible for locating woodshops in the area that were accepting new students and which were wheelchair accessible (17-18). It is true that plaintiff agreed to perform the woodworking class at an off-campus studio, and that she had the ultimate say as to which studio she wanted to attend. However, Pratt exercised control of plaintiff's woodworking class at the studio because it required her to complete the subject woodworking class in order to obtain her degree. Moreover, it is undisputed that plaintiff had to complete the course at an off-campus facility because she was not permitted to take classes on campus due to an issue with her service dog - a fact Pratt fails to address or rebut.

Pratt also exercised control over plaintiff's participation in the woodworking class at the studio. In this regard, pursuant the OCR Agreement, Pratt had agreed to provide plaintiff "with comparable classroom instruction such as that provided to students working in the on-campus studios, and evaluate her artwork, notwithstanding her participation at an off-campus studio" (*id.* at ¶ 4). Thus, through its instructor, Pratt supervised and provided instruction for plaintiff at the studio. While the instructor had only been at the studio three to four times before the accident occurred, Pratt, through its instructor, exercised control over plaintiff's work.

Further, Pratt agreed that "any off-campus studio space[] it identifie[d] for

[plaintiff would] provide [her] with the appropriate equipment and available amenities necessary to complete any assignments for her studio courses and/or independent study courses (*id.*)." Thus, pursuant to the OCR agreement, Pratt agreed to ensure that the off-campus studio spaces it identified would be sufficiently equipped in order for plaintiff to perform her assignments.

Finally, pursuant to the OCR agreement, Pratt was responsible for paying for the workshop certification, as well as the monthly payments for plaintiff's membership, in addition to plaintiff's transportation to and from the studio. Here, Pratt not only encouraged plaintiff to take the subject woodworking class but mandated that she take the class in order to complete and obtain her degree. Further, it located a suitable studio for plaintiff and provided plaintiff with a Pratt instructor. Thus, Pratt took "affirmative steps to supervise and control the [plaintiff's] activity" at the studio (*Pasquaretto*, 106 AD3d at 796; *see also Hores*, 230 AD2d at 712; *Derezeas v Robert H. Glover & Assoc., Inc.*, 121 AD3d 523, 523 [1st Dept 2014]).

"[T]he 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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). In this regard, "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*). Inasmuch as Pratt has failed to make a prima facie showing of entitlement to judgment in

its favor, the court need not address plaintiff's affirmation in opposition to Pratt's motion. Accordingly, Pratt's motion for summary judgment is denied.

Makeville's Motion

Makeville has failed to make a prima facie showing that it did not have notice of any defect with respect to the jointer before the accident occurred. In this regard, it is true that Ms. Mierzwa inspected the jointer when she first received it and found that all parts were in good working order. Further, Mierzwa testified that there were no problems with the cutterguard, the spring tension, or the set screw on the jointer from the time it arrived at the studio until the time of the accident (NYSCEF Doc No. 29 at 47); that no one had ever reported to her that the guard was sticking against the edge of the table as opposed to snapping back into place; and that she had never seen such "sticking" occur and did not think it was possible (*id.* at 47-48).

In addition, Ms. Mierzwa testified that from the time the jointer was placed in the studio until the day the accident occurred, there had been no issue regarding the on/off switch working properly, and that she had never heard of the jointer turning back on after someone had turned the machine off with the on/off switch (*id.* at 49).

Finally, Mierzwa testified that plaintiff never complained to the studio that the machines were not adequate for what she needed to do (*id.* at 127).

However, Makeville acknowledges that on one occasion, before the accident

occurred, plaintiff had pushed the stop/off button on the jointer but it did not turn off. Further, plaintiff testified that one of the shop techs told her that she needed to push the stop/off button for a longer period of time in order to make the jointer stop. Thus, as Makeville concedes, the studio was aware that there was a potentially dangerous issue with respect to the stop/off button before the accident occurred.

Nevertheless, Makeville has made a prima facie showing that it is entitled to summary judgment dismissing plaintiff's complaint based upon the release plaintiff signed after she passed the studio workshop certification. "Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Durand v Salvation Army*, 186 AD3d 1325, 1326 [2d Dept 2020]). In this regard, "[i]f the language of a release is clear and unambiguous, the signing of a release is a jural act binding on the parties" (*id.*).

Here, by signing the release, plaintiff acknowledged that the activities at the studio included, but were not limited to, using "woodworking and other machinery, equipment and tools" located at the studio; she agreed to participate in these activities "completely at [her] own risk;" she "[a]cknowledge[d] that the woodworking and other machinery, equipment and tools located on the [p]remises [were] dangerous;" and she represented and certified that she understood "the risks involved in using such machinery, equipment and tools and in participating in other activities on the [p]remises and willing[ly] assum[ed] full responsibility for [herself] . . . loss of personal property, bodily injury

and/or death arising out of, or in any way connected with, [her] participation . . . in activities on the [p]remises." Under the release, plaintiff further agreed that Makeville would not be liable "for any damages, including but not limited to those arising from personal injuries sustained by [her] . . . in or about the [p]remises, whether or not caused by negligence of any of the [r]eleased [p]arties" which meant that plaintiff would assume "all risks, *known and unknown*, involved in participation in any activity on the [p]remises" and would "hold the [r]eleased [p]arties harmless for any damages or injuries that [she] . . . [might have] sustain[ed] in the pursuit of any activity while on or about the [p]remises," and that she

> "assume[d] full responsiblity for any injuries or damages that may [have] occur[e]d to [her] . . . in or about the [p]remises and fully and forever release[d] and discharge[d] the [r]eleased [p]arties from any and all claims, demands, damages, rights or causes of action, whether present or future, known or unknown, anticipated or unanticpated, resulting from or arising out of [her] use . . .of the woodworking and other machinery, equipment and tools located on the [p]remises and/or in any other activities on the [p]remises" (emphasis added).

Finally, pursuant to the release, plaintiff further agreed "to abide by and follow all applicable rules, policies and procedures of" the studio "during [her] use . . . of the facilities on the [p]remises;" and to "immediately report any injuries or property damage or any condition that could be dangerous to others to a representative of Makeville who [was] then present on the premises."

Moreover, as Makeville argues, plaintiff testified that she was familiar with the dangers associated with the use of machines such as a jointer even before she attended Pratt. Specifically, plaintiff testified that when growing up, she understood that power tools could be dangerous if misused because her grandfather owned power tools including a jointer. She also testified that, before the accident, she had taken Woodworking I at Pratt in 2014 or 2015. That class included a unit on shop safety, with written materials specifically devoted to shop safety (NYSCEF Doc No. 28 at 34), as well as a test on the subject (*id.* at 34-35), and a shop orientation manual (*id.* at 35), which included the topic of machine safety (*id.* at 36), stating that different machines in shop class could be hazardous if certain safety rules were not followed (*id.* at 35-36). Further, in that shop orientation safety class, plaintiff was trained to use the jointer (*id.* at 39) although was not permitted to use it because, she assumed, it was too dangerous. Further, plaintiff testified that the class made clear that machines, including jointers, were dangerous when they were used carelessly; that lack of care and attention while using them could cause serious injury; and that she understood that serious injury while using these machines could include injury to hands or limbs including amputations (*id.* at 41).

However, in opposition, plaintiff has raised a material issue of fact as to whether the release was void as against public policy. In this regard, General Obligations Law § 5-326 provides that:

> "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."

Accordingly, the statute "prohibits an owner or operator of a recreational facility from enforcing a release given by an individual who has paid it a fee or other compensation for the use of the facility" (*Boateng v Motorcycle Safety School, Inc.*, 51 AD3d 702, 703 [2d Dept 2008]). "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 University*, 2 AD3d 1017, 1018 [3d Dept 2003], *lv denied* 2 NY3d 701 [2004]). However, "[f]acilities that are places of instruction and training, rather than amusement or recreation, have been found to be outside the scope of the statute" (*id.* at 1018-1019 [internal citations and quotation marks omitted]). "In assessing whether a facility is instructional or recreational, courts have examined, inter alia, the organization's name, its certificate of incorporation, its statement of purpose and whether the money it charges is tuition or a fee for use of the facility" (*Tiede v Frontier Skydivers, Inc.*, 105 AD3d 1357, 1358 [4th Dept 2013] [internal citations and quotation

marks omitted]).

However, "[d]ifficulties arise in this area of law in situations where a person is injured at a mixed-use facility, namely, one which provides both recreation and instruction" (*Lemoine,* 2 AD3d at 1019). In particular, "[i]n some cases, courts have found that General Obligations Law § 5-326 voids the particular release where the facility provides instruction only as an 'ancillary' function, even though it is a situation where the injury occurs while receiving some instruction" (*id.*, citing *Bacchiocchi v Ranch Parachute Club*, 273 AD2d 173, 175-176 [1st Dept 2000]; *Wurzer v Seneca Sport Parachute Club*, 66 AD2d 1002, 1002-1003 [4th Dept1978]; *see also Debell v Wellbridge Club Mgt., Inc.*, 40 AD3d 248, 249 [1st Dept 2007] ["Rather than focusing on whether plaintiff's activity was recreational or instructional, the motion court's focus should have been on whether the Spa's purpose was recreational or instructional"]). In contrast, "[i]n other mixed-use cases, courts focused less on a facility's ostensible purpose and more on whether the person was at the facility for the purpose of receiving instruction" (*Lemoine*, 2 AD3d at 1019, citing *Scrivener v Sky's the Limit*, 68 F Supp 2d 277, 281 [1999]; *Lux v Cox*, 32 F Supp 2d 92, 99 [WD NY 1998]).

Review of the case law indicates that the Second Department focuses on the purpose of the facility to determine whether General Obligations Law § 5-326 will void a liability release (*see Boateng*, 51 AD3d at 703 [release not void under General Obligations Law § 5-326 where raceway premises were used for instructional, not

recreational or amusement purposes and "defendant made an initial showing that contract fee paid by the plaintiff constituted tuition for a course of instruction and not a use fee for use of a recreational facility as contemplated by the statute"]; *Fusco v Now & Zen, Inc.*, 294 AD2d 466, 467 [2d Dept 2002] [issue of fact as to whether release was void under General Obligations Law § 5-326 where plaintiff submitted evidence that facility was used for recreational purposes and defendants submitted evidence that "attendees attended classes, which were always supervised by a teacher or teachers instructing them in karate"]; *Millan v Brown*, 295 AD2d 409, 411 [2d Dept 2002] [where "plaintiff paid a $30 instruction fee directly to the defendant . . . for the lesson and was injured while taking a riding lesson . . . the riding establishment was not 'a place of amusement or recreation' within the meaning of General Obligations Law § 5-326 and hence, had a waiver been obtained, such a waiver would not have been rendered void under the statute"]; *Baschuk v Diver's Way Scuba*, 209 AD2d 369, 370 [2d Dept 1994] [release not voided by General Obligations Law § 5-326 where "defendant's private swimming pool was used for instructional, not recreational or amusement, purposes" and "the tuition fee paid by the plaintiff for a course of instruction [was] not analogous to the use fee for recreational facilities contemplated by the statute"]).

Here, plaintiff argues that it is undisputed that a "fee" was paid to Makeville on her behalf for "monthly fees" which, according to Ms. Mierzwa, covered her "access to the machines" and to "work benches and storage space" (Mierzwa, 27, 29, 127). Plaintiff

also contends that the "nature" of the studio was recreational because Mierzwa testified that plaintiff did not take any classes at the studio, the studio did not provide her with any instruction, and the studio was a "woodworking community shop." Plaintiff also asserts that the studio is recreational because its website states that it is "a hands-on lab for craft, building, art and invention" where participants can build things such as bowls, garden planters, furniture and various arts and crafts.

The record reflects that the studio serves as a recreational and instructional facility. First, the studio provides instruction by giving classes and providing instructors to assist its attendees. On the other hand, according to Ms. Mierzwa, "members" do not receive instruction but are permitted to use the studio to perform woodworking tasks.[8] Second, the Makeville website indicates that the studio functions in a dual capacity. In this regard, its statement that it is "a hands-on lab for craft, building, art and invention" connotes a recreational bent. However, the website also emphasizes its instructional component, noting prominently on the first page "Skills on your schedule *Take a Private Lesson." Third, Makeville did not receive a "fee" in the classic sense normally provided to "recreational facilities [as] contemplated by the statute" (*Baschuk*, 209 AD2d at 370) - rather it was paid a monthly - i.e. recurring membership fee ($400) on plaintiff's

[8]As noted above, Ms. Mierzwa testified that there was a difference between an individual who was a member at the studio and an individual who was taking classes at the studio because someone taking classes at the studio was not a member (*id.* at 126). A member performed the workshop certification, but did not receive any instruction from studio employees, studio independent contractors, or other studio individuals about woodworking or how to use equipment in the shop (*id.*).

behalf - more in the nature of tuition for a course of instruction. Therefore, a material question of fact exists as to whether the release is valid.

Plaintiff has also raised a triable issue of fact as to whether the release encompassed 1) the allegedly defective and inherently dangerous machinery provided to her at the studio and 2) the "acts or conduct" that occurred before she began working at Makeville, including Makeville's alleged failure to determine her minimal experience using a jointer, and its purported failure to train and supervise her. In this regard, plaintiff relies upon the unsworn report of Les Winter, P.E., woodworking machinery expert and electrical engineer.

As plaintiff argues, Mr. Winter found that: 1) Makeville did not properly maintain the jointer because the set screw associated with the cutterhead had not been adequately tightened; (his report states that "[b]ecause the guard had . . . fallen to the infeed table level, *it follows that the set screw was not adequately tightened*" and "[b]y failing to adequately check and tighten the set screw, Makeville created an unreasonably dangerous condition which caused the injury") (NYSCEF Doc No. 46, at 6-7) (emphasis added); and 2) that in his postaccident inspection, the stop/off button on the jointer did not work because when the button was pressed, the jointer turned off but then turned back on when the button was released - making it "most probable that the machine continued to run" after plaintiff pushed the button, and that this "unreasonably dangerous condition may have contributed" to plaintiff's injury (*id.* at 7). In snm, Mr. Winter opines that

"[h]ad the machine been properly maintained the [cutter] guard would not have fallen to the table and the motor would have stopped when the 'OFF' control was actuated" (id.).

As an initial matter, an unsworn expert affidavit does not constitute competent evidence to oppose a motion for summary judgment (*Lefkowitz v Kelly*, 170 AD3d 1148, 1150 [2d Dept 2019]; *Chtchannikova v City of New York*, 174 AD3d 572, 573 [2d Dept 2019] [unsworn engineer's report]; *Hoffman v Mucci*, 124 AD3d 723, 724 [2d Dept 2015] [engineer's unsworn report]). However, in this case, Makeville fails to raise an objection to Mr. Winter's unsworn report and thus "any deficiency in the plaintiff's submission has been waived" (*Lefkowitz*, 170 AD3d at 1150).

Addressing the merits, "a general release may not be read to cover matters which the parties did not desire or intend to dispose of" (*Huma v Patel*, 68 AD3d 821, 822-823 [2d Dept 2009]). "In order to be entitled to dismissal of an action based upon a release, the movant must show that the release was intended to cover the subject action or claim" (*Mazzurco v PII Sam, LLC*, 153 AD3d 1341, 1342 [2d Dept 2017] [internal citations and quotation marks omitted]). In this regard, "[t]he meaning and coverage of a general release depends . . . upon the purpose for which the release was actually given, and a general release may not be read to cover matters which the parties did not desire or intend to dispose of" (*id.* [internal citations and quotations omitted]). Further, "[i]f the recitals in the release appear to limit the release to only certain claims, demands, or obligations, the release will operate only as to those matters" (*id.*).

Here, a triable issue of fact exists as to whether the set screw and the stop/off button were defective. As noted, Mr. Winter opines that the cutterguard would not have dropped had the set screw been sufficiently tightened, and that the malfunctioning of the stop/off button he observed during his inspection may have contributed to plaintiff's accident. Even disregarding these conclusions, it is undisputed that the cutterguard tilted so that it was obstructed by the outfeed table (or that the cutterguard snagged on the outfeed table) and was blocked from closing, meaning that before the accident occurred, the cutterguard did not snap back into place (*id.* at 105-106). This evidence raises a material question of fact as to whether there was a malfunction with the jointer, which ultimately led to plaintiff's accident. Given the foregoing, and the absence of any language relating to products liability and negligent design in the release, a material question of fact exists as to whether the release extended to these claims, namely whether plaintiff's assumption of concealed or unreasonably increased risks" were contemplated by the parties (*Serin*, 145 AD3d at 469 ["issues of fact exist as to whether defendants were negligent in failing to properly instruct plaintiff, a first-time spin cycler, in the operation of the cycle and of the nature of the risks involved" and "*[f]or these same reasons, issues of fact also exist as to plaintiff's assumption of concealed or unreasonably increased risks*"] [emphasis added]; *see also Johnson* v *Thruway Speedways, Inc.*, 63 AD2d 204, 206 [3d Dept 1978] [where plaintiff/spectator at automobile racetrack was injured by employee of racetrack who was driving a truck, material question fact existed

as to whether "the incident was of the type contemplated by the parties at the time the release was signed"]; *Blog*, 254 AD2d at 66 ["(t)he subject release extends only to negligence claims arising out of the race or 'event[s]', and does not appear to cover acts or conduct occurring prior to the race involving the design, manufacture or sale of the go-kart"]).

Finally, to the extent Makeville argues that it is entitled to dismissal of the complaint based upon the doctrine of primary assumption of risk, it is rejected. "Voluntary participants in activities where there is an elevated risk of danger, typically sporting and entertainment events, may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation'" (*Westerville v Cornell Univ.*, 291 AD2d 447, 447 [2d Dept 2002], quoting *Turcotte v Fell*, 68 NY2d 432, 439 [1986]). In this regard, "[a]wareness of the risk should be 'assessed against the background of the skill and experience of the particular plaintiff'" (*id.*, quoting *Morgan v State of New York*, 90 NY2d 471, 486 [1997][internal quotation marks omitted]), and does not include 'unassumed, concealed or unreasonably increased risks'" (*id.*, quoting *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 658 [1989]). The doctrine is also applicable "in matters concerning the voluntary participation in a dangerous *nonsporting* activity" (*id.*, citing, among other cases, *Watson v State of New York*, 52 NY2d 1022 [1981] [emphasis added]). Since the doctrine does not apply to "unassumed, concealed or unreasonably

increased risks," to the extent Makeville asserts that this doctrine serves to relieve it of liability, it is rejected.

In summary, the motions of Pratt and Makeville, mot. seqs. one and two, are denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. WAVNY TOUSSAINT