

**Cagan v 617-625 W 46th St. Owner LLC**

2023 NY Slip Op 30783(U)

February 28, 2023

Supreme Court, New York County

Docket Number: Index No. 153640/2022

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

-----X

KIMBERLY CAGAN,

Plaintiff,

- v -

617-625 W 46TH STREET OWNER LLC, HUDSON 46 INC
D/B/A HARBOR NYC, NEW AGE PRODUCTIONS INC.
D/B/A HUNK-O-MANIA

Defendants.

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INDEX NO. 153640/2022
MOTION DATE 06/17/2022
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 25, 26, 27, 28, 29, 31, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for DISMISSAL

Plaintiff, (plaintiff), commenced this action for personal injuries against defendants, 617-625 W 46th Street Owner LLC (owner), Hudson 46 Inc d/b/a Harbor NYC (Hudson 46), New Age Productions Inc. d/b/a Hunk-O-Mania (New Age), stemming from a November 6, 2021 slip and fall at the premises located at 621 West 46th Street, New York, New York, also known as "Harbor NYC Rooftop and/or Harbor New York City." Defendant, New Age now moves pursuant to CPLR 3211(a)(1) and (5) to dismiss the complaint. The motion is opposed. For the following reasons, the motion is denied.

Plaintiff alleges that she was injured while attending a dance performance at the premises entitled "Hunk-O- Mania." Plaintiff alleges that while she was at the performance, she was caused, "to trip and/or slip and fall due to a wet, slippery, dangerous condition on the steps leading to the stage of the subject premises, insufficient and/or poor lighting of the steps, and/or defective and inadequately maintained aforementioned steps as a result of which plaintiff sustained serious and severe personal injuries" (NYSCEF doc. no. 15, complaint at ¶ 41).

In support of their motion, New Age submits the affidavit of its principal, Armand Peri (principal), wherein the principal states that Hunk-O-Mania is a Vegas-style audience participation show featuring exotic male dancers (NYSCEF doc. no. 16 at ¶ 2). The principal states that plaintiff purchased a ticket to the performance, entitled "Diva Ultimate Package Ticket" through Fare Harbor Ticket Platform and signed a "terms and conditions" in connection with her purchase. The principal further states that all purchasers of tickets must sign a clickwrap link online and again in person.

The online release states:

“YOU ASSUME ALL RISK AND DANGER INCIDENTAL TO THE GAME, EXHIBITION, EVENT, OR PERFORMANCE, WHETHER OCCURRING PRIOR TO, DURING, OR AFTER SAID SHOW. YOU ASSUME ALL RISK AND DANGER OF BEING INJURED BY THROWN, BATTERED, KICKED, SHOT, ETC. OBJECTS AND YOU AGREE THAT THE MANAGEMENT, ITS AGENTS, AND THE PERFORMERS ARE NOT RESPONSIBLE OR LIABLE FOR ANY INJURIES RESULTING FROM SUCH CAUSES”

(NYSCEF doc. no. 17).

The release further states that: “DURING CERTAIN ACTS IN THE SHOW, LADIES FROM THE AUDIENCE ARE BROUGHT ON STAGE TO PARTICIPATE IN VARIOUS ROUTINES” (*id.*). According to the principal, plaintiff was part of the performance when she slipped on the steps leading to the stage.

New Age also submits a waiver, in which it states plaintiff signed, stating that: “I assume all risk and danger incidental to this event and/or performance whether occurring prior to, during or after said event. I assume all risks and dangers of being injured and, I agree that the management, its agents, and the performers are not responsible or liable for any injuries resulting from such causes” (NYSCEF doc. no. 18).

In support of its motion to dismiss, New Age first argues that plaintiff executed a general release prior to purchasing her ticket to the event, which in part, released New Age from liability for claims of personal injury by its guests. New Age next argues that plaintiff assumed the risk of her injury by agreeing to the waiver. New Age also argues that plaintiff assumed the risk of falling by agreeing to participate in the performance. In opposition, Hudson 46 and the owner argue that New Age’s motion is premature, as no discovery has taken place as to the circumstances of plaintiff’s fall. Hudson 46 and the owner also argue that if New Age’s motion is granted under a primary assumption of risk, the complaint should also be dismissed against Hudson 46. Hudson 46 and the owner further argue that in the event this matter is dismissed against New Age, that Hudson 46 and the owner’s respective crossclaims against New Age should be converted to third party claims.

Plaintiff argues that the release purportedly signed by plaintiff is void against public policy pursuant to General Obligations Law (GOL) § 5-326 because New Age’s event was a place of recreation or amusement that plaintiff paid to be admitted to. Plaintiff further argues that the release does not equate to plaintiff’s assumption of the risk. In partial opposition, the owner and Hudson 46 argue that if the motion is granted, then the complaint and crossclaims should likewise be dismissed as against them. In reply, New Age argues that he is not an owner or operator pursuant to the GOL, as New Age only occasionally licenses two rooms and performance space for its shows. Specifically, New Age argues that it was not responsible for security, set-up or clean-up, control the entry of guests, equipment, insurance procurement obligations, indemnifying Harbor Nightclub, and for obtaining the required license and permits needed for the operation of the venue.

## DISCUSSION

On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87. CPLR § 3211(a)(1) states that: "A party may move for judgment dismissing one or more causes of action asserted against him on the grounds that a defense is founded upon documentary evidence." Dismissal under CPLR 3211(a)(1) is warranted where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs claim" (*Fortis Financial Services, LLC v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]).

CPLR § 3211(a)(5) provides that "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the cause of action may not be maintained because of...[a] release." "A release is a contract, and its construction is governed by contract law" (*Kaminsky v Gamache*, 298 AD2d 361, 361 [2d Dept 2002]; *see Rivera v Wyckoff Hgts. Med. Ctr.*, 113 AD3d 667, 670 [2d Dept 2014]).

General Obligations Law § 5-326, which states that "Agreements exempting . . . places of amusement or recreation and similar establishments from liability for negligence are void and unenforceable." As plaintiff argues, this case is akin to the recent Appellate Division, First Department case entitled *Nicaj v Bethel Woods Ctr. for the Arts, Inc.* (189 AD3d 485, 485 [1st Dept 2020]). In *Nicaj*, plaintiff was injured when she fell into a tire rut while attending an outdoor music festival (*id.* at 485). The First Department held that "[t]his action is not barred by the release allegedly obtained by defendants in connection with the online festival ticket purchase" (*id.*). In finding that release is void and unenforceable pursuant to GOL § 5-326, the court determined that, "[t]he grounds on which the music festival was held were a place of amusement or recreation or a similar establishment, and plaintiff paid a fee to the owners and operators of the event to participate in the festival" (*id.* at 486). Here, New Age may not rely on the release as a shield against liability because the event at the premises, as alleged, was a place of amusement or recreation that plaintiff paid an entrance fee to New Age, and New Age owned or operated the event. The Court notes that the licensing agreement between Hudson 46 and New Age does not conclusively establish that New Age did not operate the premises, and New Age does not submit an affidavit or other proof that it did not operate the premises.

New Age's reliance on *Lago v Krollage* (78 NY2d 95, 101 [1991]) is misplaced, since in that case, the Court of Appeals affirmed the lower court's determination granting the moving defendant's motion for summary judgment on the basis that there was no evidence establishing that it operated or owned the subject premises, whereas there is no such proof here, especially since no discovery has been exchanged concerning the circumstances surrounding plaintiff's incident or whether New Age operated the premises.

New Age's reliance on *Webster v Forest Green Apartment Corp.* (174 A.D.3d 668 [2d Dept 2019]) for the premise that "a valid release constitutes a complete bar to an action on a claim which is the subject of the release" is also misplaced. The court in *Webster* affirmed the dismissal of certain claims pursuant to CPLR 3211(a)(5) based on a "[r]elease [that] barred so much of the instant action as was based on conduct that occurred prior to the execution of the

settlement agreement and release” (*id.* at 669), whereas here, the release barred prospective liability.

There is no basis to dismiss the complaint on the defense of plaintiff’s assumption of the risk. New Age admits as much in its reply by requesting that the court treat its pre-answer motion to dismiss [] as one seeking summary judgment pursuant to CPLR 3212” (NYSCEF doc. no. 38 at ¶ 18). Other than the allegations set forth in the complaint, there has been no discovery as to the circumstances surrounding the nature and cause of plaintiff’s slip and fall. Accordingly, even if the Court were to convert New Age’s motion to a motion for summary dismissal, the motion would be denied as premature.

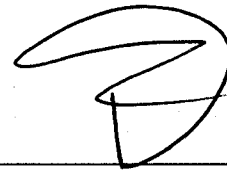
Accordingly, it is hereby

ORDERED that New Age’s motion pursuant to CPLR 3211(a)(1) and (5) to dismiss the complaint and crossclaims is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on March 21, 2023 at 9:30 a.m.; and it is further

ORDERED that plaintiff shall serve a copy of this order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



2/28/2023

DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE