

McSween v Rockin Jump NYC, LLC.

2023 NY Slip Op 34938(U)

January 12, 2023

Supreme Court, Westchester County

Docket Number: Index No. 68018/2021

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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STEVE MCSWEEN,
Plaintiff,

Index No. 68018/2021

- against -

Motion Seq. 1

ROCKIN JUMP NYC, LLC. d/b/a ROCKIN' JUMP,
RJMK PARK, LLC. and ROCKIN JUMP HOLDINGS LLC.,

DECISION & ORDER

Defendants.

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In this action for alleged personal injuries, defendants move, pre-answer, to dismiss plaintiff's complaint pursuant to CPLR 3211 (a)(1)(7); or in the alternative, staying the Supreme Court action and pursuant to CPLR §7503 compelling arbitration with the AAA; and dismissing plaintiff's complaint as against defendants RJMK PARK LLC. and ROCKIN JUMP HOLDINGS, LLC., pursuant to CPLR 3211 (a)(1), (7) and (8); together with such other and further relief as this Court may deem just and proper.

The following papers were read and considered on this motion:

Papers Considered

NYSCEF DOC NO. 6-25

1. Notice of Motion/Affirmation of Kevin T. Fitzpatrick, Esq. in Support/Memorandum of Law/Exhibits A-F.
2. Affirmation of John A. Maher, Esq. in Opposition/Exhibits 1-3.
3. Affirmation of Kevin T. Fitzpatrick, Esq. in Reply/Exhibit A (Affidavit of James A. Diamond), Exhibits 1-2.

Factual and Procedural Background

Plaintiff commenced this action by filing a Summons and Complaint on December 30, 2021. Defendants now move, pre-answer, to dismiss plaintiff's complaint pursuant to CPLR 3211 (a)(1)(7); or in the alternative, staying the Supreme Court action and pursuant to CPLR 7503 compelling arbitration with the AAA; and dismissing plaintiff's complaint as against defendants RJMK PARK LLC. and ROCKIN JUMP HOLDINGS, LLC., pursuant to CPLR 3211 (a)(1), (7) and (8).

In opposition, plaintiff argues, *inter alia*, that defendants failed to satisfy their burden of proof, through properly authenticated documentary evidence, supporting their

motion to dismiss, pursuant to CPLR 3211. Plaintiff argues that defendants' reliance, in part, upon the Rockin' Jump Mount Kisco Waiver in support of their motion to dismiss is insufficient, as movants have not authenticated the document through submission of the affidavit of Patricia Soehnlein ("Soehnlein"). Though she has worked for defendants since 2015, plaintiff maintains that her affidavit does not address how long she has worked at the location where the accident happened. Also, while she states she is currently an Assistant Manager in Mount Kisco, as of May 2022, the events surrounding his accident occurred in 2019. Furthermore, plaintiff asserts that the Soehnlein Affidavit does not describe that she worked at the Mount Kisco location at the time of the accident, nor does she make clear that she was knowledgeable about the procedures of that location in 2019. Plaintiff submits his own affidavit in opposition and states he was a chaperone for a group of young people during an outing, that he had never been to the location before and he was shown an iPad like device after he paid the entrance fee. Additionally, plaintiff argues that he cannot confirm that defendants' Exhibit "C", ie. the Rockin' Jump Mount Kisco Waiver is identical to what was depicted on the iPad, as he was not provided with a physical copy of it and the signature on the last page does not appear to be his signature. Furthermore, he argues that the waiver is against public policy.

In reply, defendants argue, *inter alia*, that plaintiff's opposition fails to rebut the authenticated and admissible documentary evidence they submitted, which demonstrates the key fact that plaintiff agreed to arbitrate any claims arising from his participation in activities at the facility.

Furthermore, defendants argue that plaintiff's action should be dismissed outright against defendants RJMK Park, LLC. and Rockin Jump Holdings, LLC., pursuant to the Affidavit of James Diamond which authenticates the Lease Assignment transferring RJMK Park, LLC.'s interest in the subject Lease for the premises to Rockin Jump NYC, LLC. approximately two (2) years prior to the alleged incident and establishes that RJMK Park, LLC. had no connection to the subject premises at the time of the incident. Defendants further submit that as plaintiff does not oppose the portion of defendants' motion seeking dismissal of the claims against Rockin Jump Holdings, LLC. based on lack of personal jurisdiction and failure to serve the complaint on Rockin Jump Holdings LLC., the action should also be dismissed against that defendant pursuant to CPLR 3211(8).

Discussion

The Court will first address that branch of the motion to dismiss plaintiff's complaint as against defendants RJMK PARK LLC. and ROCKIN JUMP HOLDINGS, LLC., pursuant to CPLR 3211 (a)(1), (7) and (8).

Pursuant to CPLR 3211 (a)(1), a complaint may be dismissed where a "defense is founded upon documentary evidence". However, to prevail under this provision, "the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim". See *Teitler v Max J Pollack & Sons*, 288 AD2d 302 [2d Dept. 2001].

By contrast, on a motion for dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "[the Court's] well-settled task is to determine whether, 'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated'". See *Campaign for Fiscal Equity, Inc v State*, 86 NY2d 307, 318 [1995] [internal citations and quotation marks omitted]. In performing that task, the Court "[is] required to accord plaintiff] the benefit of all favorable inferences which may be drawn from [its] pleading, without expressing [any] opinion as to whether [it] can ultimately establish the truth of [its] allegations before the trier of fact" (*ibid.*). On a motion to dismiss pursuant to CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...". See *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

The court finds that the documentary evidence submitted on this motion, with respect to defendants RJMK PARK LLC. and ROCKIN JUMP HOLDINGS, LLC., has not been refuted by plaintiff with other documentary evidence and therefore the action will be dismissed as against those defendants, pursuant to CPLR 3211 (a)(1), (7) and (8).

However, after according plaintiff all favorable inferences, as is required, and without expressing any opinion as to whether he can ultimately prove his claims, as is also required, the court finds that the complaint supplemented by affidavit, demonstrates that a cause of action exists as against the remaining defendant ROCKIN JUMP NYC, LLC. d/b/a ROCKIN' JUMP.

However, "(w)here there is no substantial question whether a valid agreement was made...the court shall direct the parties to arbitrate" (See *Revis v Schwartz*, 192 AD3d 127 [2d Dept 2020] quoting *Sutphin Retail One, LLC v Sutphin Airtrain Realty, LLC*, 143 AD3d 972 [2d Dept 2016]; CPLR 7503[a]; See also *Matter of Northeast & Central Contractors, Inc v Quanto Capital, LLC*, 203 AD3d 925 [2d Dept 2022]).

As plaintiff agreed to arbitration when signing the "Rockin Jump Mount Kisco Waiver", which the Court finds to have been properly authenticated, plaintiff agreed to arbitrate his claims and the matters in dispute fall within the scope of the parties' agreement to arbitrate¹. See *Sisters of St John the Baptist v Geraghty*, 67 NY2d 997 [1986].

All other arguments raised on this motions and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

Accordingly, it is

¹ See "Rockin Jump Mount Kisco Waiver" filed to NYSCEF as Exhibit C, Doc. No. 11 and Affidavit of Patricia Soehnlein filed to NYSCEF as Exhibit B, Doc. No. 10.

ORDERED that the branch of defendants' motion seeking an Order dismissing plaintiff's complaint, as against defendants RJMK PARK LLC. and ROCKIN JUMP HOLDINGS, LLC., pursuant to CPLR 3211, is GRANTED; and it is further

ORDERED that the branch of the motion by defendants seeking to dismiss the action as against ROCKIN JUMP NYC, LLC. d/b/a ROCKIN' JUMP, or in the alternative, for an Order staying the Supreme Court action and, pursuant to CPLR 7503, compelling arbitration with the AAA is GRANTED, to the extent that this action is hereby STAYED and the parties are directed to proceed to arbitration with the AAA.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 12 , 2023



HON. WILLIAM J. GIACOMO, J.S.C.