SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO **PART** 33M
Justice

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DYLAN PETRICH,

Plaintiff,

- v -

CRYOFUEL LLC,JOHN DOE

Defendant.

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INDEX NO. 158512/2020

MOTION DATE 05/21/2025

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY.

Appearances:
Plaintiff Dylan Petrich: The Neveloff Law Firm, PC (Daniel I. Neveloff, Esq.)
Defendants: Litchfield Cavo LLP (Joseph E. Boury, Esq.)

Upon the foregoing documents, and after oral argument, which took place on September 16, 2025, Defendants Cryofuel LLC ("Cryofuel") and "John Doe" (collectively "Defendants") motion for summary judgment dismissing Plaintiff's Complaint is denied.

I. Background

On October 30, 2017, Plaintiff received cryotherapy from Defendants. Prior to receiving treatment, he signed an assumption of the risk, release and waiver form (NYSCEF Doc. 43). Plaintiff received cryotherapy naked, and complained to the Cryofuel employee administering the treatment about discomfort in his genitals (*id.* at 45-46). The Cryofuel employee allegedly said "that's normal, that's where muscle is recovering" (*id.*). When the treatment ended, Plaintiff continued to feel discomfort in his genitals (*id.* at 50-51). Plaintiff sought medical treatment and was diagnosed with frostbite on his genitals (*id.* at 61).

Mitchell Figueroa, a Cryofuel employee, testified he did not remember any signs on the premises instructing clients to wear underwear during treatment (NYSCEF Doc. 45 at 21). But he testified he was trained to always tell clients to wear underwear during treatment (*id.* at 22). Cryofuel's owner, Benjamin Feinson, also testified he could not remember if there were any signs warning customers to wear underwear (NYSCEF Doc. 54 at 30). Cryofuel's training manual states employees must always check to ensure customers "have everything they should be wearing on" after which they must "[s]how [customers] into the machine" (NYSCEF Doc. 47 at p. 7). Defendants now move for summary judgment dismissing Plaintiff's Complaint. Plaintiff opposes.

II. Discussion

A. Waiver and Release

Defendants' motion for summary judgment is denied. The waiver and release form reads as follows:

> By engaging Cryofuel LLC (the "Company") to provide cryotherapy, infrared sauna and related services ("Services") and using the Company's equipment and facilities in relation thereto, I hereby acknowledge… that there are certain inherent risks and dangers associated with receiving Services and my use of the Company's equipment and facilities. At all times, I shall comply with all stated and customary terms, posted safety signs, rules, and verbal instructions given to me by staff.
>
> * * *
>
> I hereby (1) agree to assume full responsibility for any and all injuries or damage which are sustained or aggravated by me in relation to my receiving of the Services, (2) release, indemnify, and hold harmless the Company … and each of their respective officers, directors, members, employees, representatives and agents … from any and all responsibility, claims, actions, suits, procedures, costs, expenses, damages, and liabilities to the fullest extent allowed by law arising out of or in any way related to the Services, and (3) represent that: … (e) knowing the risks involved I nevertheless chose to voluntarily request the Services.
>
> * * *
>
> I have read this Assumption of Risk, Waiver, and Release, fully understand its terms, and understand that I am giving up substantial rights including my right to sue the Company under certain circumstances. I acknowledge that I am signing this waiver freely and voluntarily. (NYSCEF Doc. 43).

Defendant failed to meet its *prima facie* burden of eliminating issues of fact regarding the application of General Obligations Law § 5-326. That law states every agreement:

> "entered into between the owner or operated or any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operated 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."

Because Cryofuel's business offered a variety of therapeutic treatments akin to a spa, including cryotherapy and an infrared sauna (NYSCEF Doc. 47), and because Plaintiff described the premises as looking like "a yoga studio," a reasonable jury could find that Cryofuel operated a place of recreation or some "similar establishment" which would make the release and waiver void pursuant to General Obligations Law § 5-326 (*see Shaw v AKT Inmotion Inc.*, 204 AD3d 524, 525 [1st Dept 2022]; *Nicaj v Bethel Woods Center for the Arts, Inc.*, 189 AD3d 485, 486 [1st Dept 2020]; *Serin v Soulcycle Holdings, LLC*, 145 AD3d 468, 469 [1st Dept 2016]). Cryofuel makes no showing in its motion of how or why General Obligations Law § 5-326 does not apply which requires denying summary judgment premised on the release and waiver (*see also Debell v Wellbridge Club Management, Inc.*, 40 AD3d 248, 249-250 [1st Dept 2007] [waiver and release signed in connection with use of spa unenforceable pursuant to General Obligations Law § 5-326]). Because the Court finds Cryofuel failed to meet its *prima facie* burden of showing General Obligations Law § 5-326 is inapplicable, the Court does not reach whether the language of the release and waiver unambiguously waived Plaintiff's right to sue Defendants for negligence.

Defendants' express assumption of the risk argument also fails. The form relied on does not expressly warn about the risk of frostbite, nor does it warn about the risks of receiving cryotherapy naked.

B. Implied Assumption of the Risk

Defendant's motion for summary judgment based on implied assumption of the risk is denied. The assumption of the risk defense is only applicable where the risks of activity are fully comprehended or perfectly obvious (*A.L. v Chaminade Mineola Society of Mary, Inc.*, 203 AD3d 1033 [2d Dept 2022]; *Levy v Town Sports Intern., Inc.*, 101 AD3d 519 [1st Dept 2012]). The doctrine does not apply where a defendant unreasonably heightens the risk of injury through their own negligence (*Serin v Soulcycle Holdings, LLC*, 145 AD3d 468 [1st Dept 2016]). Here, there are issues of fact as to whether Defendants unreasonably increased the risk of harm to Plaintiff and whether the risks were "perfectly obvious" (*Qiao v Finn*, 189 AD3d 513 [1st Dept 2020]).

As Plaintiff was able to expose certain parts of his skin to cryotherapy treatment, there remains an issue of fact as to whether he fully appreciated the risk of frostbite to his genitals by receiving cryotherapy nude. Moreover, there is an issue of fact as to whether there were any signs warning Plaintiff not to receive cryotherapy nude, as Defendants' witnesses could not remember if any of those signs were posted. Further, although the instruction manual stated Cryofuel's employees must ensure customers are wearing what they are supposed to and then show them into the machine, Plaintiff was somehow able to receive cryotherapy nude. Therefore, it remains an issue of fact as to whether the Defendants' negligence unreasonably increased the risk of harm to Plaintiff. Finally, Plaintiff may not have fully comprehended the risk of receiving cryotherapy nude, as he testified his friend told him he previously received cryotherapy naked and told him he should remove all of his clothing (NYSCEF Doc. 44 at 29-31).

C. Gross Negligence

Defendants' motion for summary judgment dismissing any claim for gross negligence is denied. Plaintiff's testimony that he was allowed to enter the cryotherapy machine naked and as

he complained about discomfort in his genitals to Cryofuel employees, he was told that it was "normal" and was met with laughter raises a triable issue of fact as to whether the Cryofuel employees' failure to act constitutes reckless disregard and wanton behavior sufficient to give rise to a gross negligence claim (*see e.g. Dillon v Motorcycle Safety School, Inc.*, 59 AD3d 280 [1st Dept 2009]; *see also Food Pageant, Inc. v Consolidated Edison Co., Inc.*, 54 NY2d 167, 172-73 [1981] ["Where the inquiry is to the existence or nonexistence of gross negligence, the ultimate standard of care is different, but the question nevertheless remains a matter for jury determination."]).

Accordingly, it is hereby,

ORDERED that Defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties via NYSCEF.

This constitutes the Decision and Order of the Court.

11/12/2025
DATE

Mary V Rosado J.S.C.
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:		CASE DISPOSED		x	NON-FINAL DISPOSITION		
		GRANTED	x DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE