Jackson v Black Ink Tattoo Studio, Inc.
2016 NY Slip Op 30318(U)
February 24, 2016
Supreme Court, New York County
Docket Number: 153054/15
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 59

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ASABI L. BARNER JACKSON,

Plaintiff,

Index No. 153054/15

-against-

BLACK INK TATTOO STUDIO, INC., CEASER EMANUEL and BRIAN "DOE",

Defendants.

----------x

JAMES, J.S.C.:

In this action seeking damages for injuries resulting from the application of a tattoo, defendants Black Ink Tattoo Studio, Inc. (Black Ink) and David Emanuel, sued herein as "Ceaser Emanuel" (Emanuel), move, pursuant to 3211 (a) (1) and (5), to dismiss the complaint.

Plaintiff Asabi L. Barner Jackson (Jackson), who lives in South Carolina, chose to have Black Ink apply a tattoo, based upon a reality TV series in which Black Ink allegedly represented itself to specialize and be experts in tattooing African American skin.

Jackson maintains that she was required to sign a waiver minutes before the tattoo artist, Brian, began the tattoo, but she was not given a copy of the waiver, and no one signed as a witness. She further maintains that she was never informed that she was accepting the risks of an inexperienced and careless employee, nor did she understand that she was waiving any right to sue defendants in the event that they were negligent, reckless or careless. Jackson alleges that she told Brian that certain light colors do not show up on her dark skin. Brian responded that he has expertise in all colors. She states that she observed Brian work on an

area where he used white ink for a longer period of time than areas where he used other colors. Jackson contends that she was permanently injured with "deep tissue damage and a very large, thick, raised keloid scar on my left breast, which constantly burns and itches, and significantly affects my daily life, including the clothes I am able to wear each day, as well as my intimate relations."

Jackson alleges two causes of action that: (1) defendants acted either negligently, recklessly, or carelessly in applying the tattoo; and (2) defendants acted negligently in not securing Jackson's informed consent before applying the tattoo.

As Jackson acknowledges, she initialed each paragraph of and signed a waiver before obtaining her tattoo. She does not dispute Black Ink's assertion that it requires all customers to review and sign a waiver before receiving services.

The waiver provides, in part:

> I have been fully informed of the inherent risks of a tattoo or piercing, including infection, scarring, allergic reactions to latex gloves and/or soap. Additional risks for a tattoo include difficulties in detecting melanoma and allergic reactions to tattoo pigment . . . Having been informed of the potential risks of a tattoo or piercing, I still wish to proceed with the tattoo or piercing application, and I freely accept and expressly assume any and all risks that may arise from tattooing or piercing.
>
> I waive and release, to the fullest extent permitted by law, Artist and Studio from all liability whatsoever, for any and all claims or causes of action that I, my estate, heirs, executors or assigns ("Additional Releasors") may have for personal injury or otherwise, including any direct or indirect damages, that result from the tattooing or the piercing, whether caused by the **negligence or fault** of Artist or Studio.

(Emphasis in original).

Above the signature line, the following appears in bold type: "I acknowledge that I have

read this Consent, that I have executed this Consent voluntarily, and that this Consent is binding upon me and the Additional Releasors."

Defendants move to dismiss the complaint, based upon plaintiff's signing of the waiver. By such waiver, defendants argue, plaintiff waived any claim for negligence, and also was provided all information required for her informed consent. Defendants contend that, thus, plaintiff is precluded from pursuing this action.

Plaintiff contends that the terms of the waiver are not specific enough to be enforceable under the laws of the State of New York, and, in any event, the waiver is void as against public policy.

Negligence Cause of Action

Plaintiff contends that waivers which purport to exculpate a party from liability for its own negligence are subject to judicial scrutiny and are not favored by the law, and are, therefore, strictly construed against the party relying on them. Plaintiff further argues that the waiver must be expressed unambiguously and clearly, and must also be understandable to the person signing it. Plaintiff maintains that, even though the waiver she signed included the word "negligence," the inclusion of such word is not dispositive because plaintiff was not informed that she was waiving risks due to defendants' fault, carelessness or negligence in the hiring and/or training of their employees. Plaintiff specifically cites the fact that the waiver was not specific to the particular type of tattoo she was getting, and included references to piercings as well as tattoos.

There is no question that exculpatory provisions in a contract that purport to insulate a

party from liability resulting from that party's negligence are disfavored by the law. Lago v Krollage, 78 NY2d 95, 99 (1991). However, it is equally true that in the absence of a contravening public policy, such provisions are enforceable so long as the language of the agreement expresses in unequivocal terms the intention to relieve the defendant of liability for its negligence. Id. at 99-100.

Here, the waiver provided that it applied to any damages, including negligence or fault of the tattoo artist or the studio. Further, the words "negligence or fault" were underlined and in bold print. Under such circumstances, it is clear that the waiver applied to any negligence of defendants. This situation is clearly distinguishable on its facts from Sivaslian v Rawlins (88 AD2d 703, 704 [3d Dept 1982]), relied upon by plaintiff, where the language of the waiver did not use the word "negligence" or "fault," but merely said that the plaintiff would "release and hold harmless" the defendant. In that case, the Court held that the terms in the waiver were not understandable to an average person. Here, however, where both "negligence" and "fault" were used in the waiver, the plaintiff did not have to possess legal knowledge in order to understand that she was releasing the defendants from liability for their own acts of negligence or fault.

While plaintiff argues that the waiver was not specific enough, in that it applied to both tattoos and piercings, and did not refer to the specific tattoo that plaintiff was receiving, the colors of the tattoo, the color of plaintiff's skin, or the name of the tattoo artist, plaintiff has not demonstrated that a waiver must contain any of that information. Unlike in DeSousa v March of Dimes Found. (2012 WL 638099, 2012 NY Misc LEXIS 715, *7 [Sup Ct, Nassau County

2012]), upon which plaintiff relies, the waiver at issue here contained the name of the entity involved, and is tailored to the two activities in which Black Ink was involved: tattooing and piercing. Further, the waiver distinguishes between the two where appropriate, and advises the customer of which waivers are applicable to which activity.

The fact that Black Ink allegedly does not provide a copy of the waiver to all its customers, and did not do so in this case, does not in any way diminish the effectiveness of the waiver, nor does plaintiff cite any law that would indicate that the standard form that she does not deny that she executed is unenforceable.

Plaintiff next argues that the waiver is unenforceable as contrary to public policy. She maintains that where the State has an interest in the health and welfare of its citizens, agreements which release a party from its own negligence are void as against public policy. She goes on to point out that tattoo studios are under the jurisdiction of the New York City Department of Health and Mental Hygiene, and require licensing. She concludes that the public's health and welfare are clearly implicated, and that, therefore, the waiver is void.

There is no question that certain waivers can be void as against public policy due to the State's interest in the health and welfare of its citizens. Rosenthal v Bologna, 211 AD2d 436 (1st Dept 1995). However, such cases are limited to where the medical condition of the plaintiff makes enforcement of the waiver unconscionable. Id. (the plaintiff was required to sign a waiver in order to obtain home healthcare which he needed after hip surgery); Ash v New York Univ. Dental Ctr., 164 AD2d 366 (1st Dept 1990) (the plaintiff was required to sign a waiver in order to be treated at a clinic for necessary services that he could not afford to pay for at a

private dentist). Here, on the other hand, plaintiff had no medical need to have a tattoo and could have chosen to forego having a tattoo or chosen another tattoo parlor if she objected to the waiver. No health or welfare considerations were implicated by her not getting the tattoo. See Rosenthal v Bologna, 211 AD2d at 438 ("exculpatory agreements will be upheld in a purely commercial setting, or where voluntary nonessential social activities are freely engaged in by consenting parties").

Consequently, there is no public policy reason for the court to invalidate the waiver, and plaintiff is bound by it.

Informed Consent

Plaintiff maintains that defendants failed to obtain informed consent from her to apply the tattoo. Defendants contend that they had no statutory obligation to obtain informed consent, but that, in any event, the waiver constituted such consent. Plaintiff responds that there is a question of fact as to whether she was adequately advised of the hazards, harmful effects and complications related to the specific tattoo that she received.

While it is true that tattoo parlors are not covered by statute requiring informed consent (Public Health Law § 2805-d), healthcare professionals not named in Public Health Law § 2805-d nonetheless have a common-law obligation to obtain informed consent. See Laskowitz v CIBA Vision Corp., 215 AD2d 26 (2d Dept 1995). However, plaintiff has not supplied any authority on which to base a finding that tattoo parlors and artists are healthcare professionals obligated to obtain informed consent.

Even assuming that defendants were required to obtain informed consent, the waiver

included warnings regarding the tattoos. Specifically, plaintiff acknowledged in the waiver that she was informed of risks "including infection, scarring, allergic reactions to latex gloves and/or soap . . . difficulties in detecting melanoma and allergic reactions to tattoo pigment." Plaintiff does not suggest any other specific hazards about which she should have been informed. Her current complaints, regarding scarring, itching and burning, are covered by the warnings in the waiver. Plaintiff does not suggest that her difficulties arise out of anything other than "infection, scarring . . . [or] allergic reactions to tattoo pigment." Plaintiff has failed to counter the defendants' assertion that all potential hazards were fully disclosed in the waiver. As a result, plaintiff has failed to refute defendants' showing that by such waiver they obtained adequate informed consent from plaintiff.

Accordingly, it is hereby

ORDERED that pursuant to CPLR 3211(a)(1), defendants' motion to dismiss the complaint is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 24, 2016

ENTER:

DEBRA A. JAMES J.S.C.