Panagiota v Hellenic Orthodox Community
2017 NY Slip Op 30534(U)
March 21, 2017
Supreme Court, New York County
Docket Number: 156637/16
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice

PART 35

Melis, Panagiota

-v-

Hellenic Orthodox Community

INDEX NO. 156637/16

MOTION DATE 12/19/16

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this personal injury action, defendant Hellenic Orthodox Community of St. Eleutherios, Inc. (the "Church") moves pursuant to CPLR 3211(a)(5) to dismiss the complaint of the plaintiff Panagiota Melis ("plaintiff") based on a written waiver agreement signed by plaintiff, and upon notice pursuant to CPLR 3212 for summary dismissal of the complaint.

Plaintiff opposes dismissal and cross moves pursuant to CPLR 3211(b) to strike defendant's fourth and fifth affirmative defenses of waiver and assumption of risk, respectively.

Factual Background

Plaintiff alleges that on February 5, 2015, she slipped and fell on snow and ice in the Church's parking lot after parking her vehicle.

In support of dismissal of the complaint, the Church argues that the clear and unambiguous agreement plaintiff signed as a member of the Church on November 11, 2014 (the "Agreement") included a waiver in which plaintiff released the Church from liability for any incidents occurring thereat. There is no evidence that the Church maliciously or intentionally caused any condition of the parking lot to harm plaintiff, or of any reckless conduct or gross negligence by the Church to find the waiver against public policy. And, General Obligations Law ("GOL") 5-326, which applies to amusement parks and recreational facilities does not apply to void the waiver, since the Church is instead, a place of instruction and training found by courts to be outside the scope of the statute.[1] The Agreement also includes an express assumption of

[1] It is uncontested that GOL-5-326's prohibition of releases involving an "owner or operator of any pool, gymnasium, place of amusement or recreation," does not apply to the Agreement.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

risk wherein plaintiff acknowledged that she was solely responsible for anything that happened to her while in the Church's parking lot.

In her cross-motion, plaintiff argues that waiver is unenforceable because it does not expressly state that the Church's own negligence is waived. Also, the waiver only addresses the situation where a claim is made against plaintiff as opposed to any claim made by her. And, to the extent the waiver seeks to relieve the Church of its own negligence, it violates GOL 5-325. Further, the assumption of risk doctrine, which applies to inherently dangerous activities, does not apply to the facts herein and is not a total defense to the Church's own negligence.

In reply and opposition to plaintiff's cross-motion, the Church argues that plaintiff addressed CPLR § 3211(a)(7), and has not addressed CPLR 3211(a)(5), and as such, dismissal under (a)(5) is warranted. The Church also argues that plaintiff signed the Agreement requiring her to make certain monetary contributions to the Church on a regular basis, and in exchange, is afforded many benefits, including the right to park on Church property. Plaintiff's $125 a month payment for parking is another way of referring to her $500 charitable contributions, which were paid every four months and for which plaintiff receives a receipt as a tax deduction. Because plaintiff's contributions are tax deductible as charitable contributions she is not paying for anything, and is not leasing a space from the Church. Plaintiff has never made any payments to the Church as a parking lot or garage for hire. At the time of plaintiff's incident, plaintiff was delinquent and had not paid or contributed anything under the Agreement and such delinquency reaffirms that the Church was not a parking lot for hire. The Church does not have any employees who monitor, grant or restrict access to or from the parking lot or who take keys or have access to plaintiff's vehicle when she parks it. The Church does not take control or possession of plaintiff's car and does not control her access to its parking lot. Thus, in addition to not being a garage for hire, the required bailor-bailee relationship does not exist, and GOL § 5-325 does not apply. The Church argues that there is no case which states that a waiver must use the word "negligence" to be enforceable. And, cases have applied the implied assumption of risk doctrine to non-sporting cases. Thus, defendant's waiver and assumption of risk defenses are valid.

In reply, plaintiff notes that she addressed CPLR 3211(a)(5) by addressing the waiver issue substantively, and her reference to (a)(7) instead of (a)(5) was an error. GOL 5-325 does not create an exception for nonprofit organizations, and the parking lot is "for hire" given that the Church accepts money to permit its members to park there. And, any ambiguities in the Agreement must be construed against the Church as the drafter. The only benefit of the Agreement is parking. And, a bailment is not necessary in order for the statute to void the waiver and for plaintiff to recover for personal injuries. Further, an agreement that is void against public policy and/or the GOL cannot serve as the basis of the express assumption of risk doctrine. And, the implied assumption of risk, which refers to the primary assumption of risk doctrine, likewise does not apply since there is no allegation that plaintiff was engaged in any inherently dangerous activity.

Discussion

As to dismissal pursuant to CPLR 3211(a)(5) based on a written "release," as stated by the Court of Appeals,

> "[U]nless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts (*Van Dyke Prods. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 304, 239 N.Y.S.2d 337, 339, 189 N.E.2d 693, 694, Supra (must be "absolutely clear"); *Ciofalo v. Vic Tanney Gyms*, 10 N.Y.2d 294, 297, 220 N.Y.S.2d 962, 964, 177 N.E.2d 925, 926, Supra ("sufficiently clear and unequivocal language"); *Boll v. Sharp & Dohme*, 281 App.Div. 568, 570-571, 121 N.Y.S.2d 20, 21-22, affd. 307 N.Y. 646, 120 N.E.2d 836 ("clear and explicit language")). Put another way, *it must appear plainly and precisely that the "limitation of liability extends to negligence or other fault of the party attempting to shed his ordinary responsibility"* (*Howard v. Handler Bros. & Winell*, 279 App.Div. 72, 75-76, 107 N.Y.S.2d 749, 752, affd. 303 N.Y. 990, 106 N.E.2d 67)" (*Gross v. Sweet*, 49 N.Y.2d 102, 400 N.E.2d 306, 424 N.Y.S.2d 365 [1979] (emphasis added)).
>
> Here, the Agreement states:
>
> As such Contributing Member I may from time to time [be] permitted to park my automobile on the premises[] of the Church. I agree that I will do so at my own risk and *will not hold the Church liable for any damage, vandalism, theft, etc., which may occur to my automobile, property or to myself or to any guest if any.* I[] further agree that I will not permit the Church to be made a party defendant in any action brought against[] me by any person or persons claiming to be injured on the Church property or on exiting the Church[] property *through my negligence or that of anyone driving my automobile*.
>
> I agree to hold the Church harmless under *any and all circumstances*. (Emphasis added)

Attached to the first page of the Agreement is a documents entitled "Saint Eleftherios Fair Share Members Parking Rules," in which the Church states in paragraph 4 that "Cars are parked at owner's risk and the Church will not be liable for cost expenses[] or damages to any person(s) or property." It is also noted that paragraph 5 of the Rules states, in bold print, that "Anyone not[] meeting their obligation for two consecutive periods will result in[] automatically losing their Fair Share Privileges." (Emphasis in the original).

Based on a plain reading of the language of the Agreement above, the Agreement does not clearly and explicitly state any intent to relieve the Church of liability resulting from the Church's negligence or fault. The only reference to negligence in the Agreement is to that of the plaintiff. Thus, the Agreement does not "express[ ] any intention to exempt ... defendant from liability for injury ... which may result from [its] failure to use due care," or "purport to release defendant from all personal injury claims, 'whether or not based on the acts or omissions of" the Church or "contain other language conveying a similar import" (*see Kim v. Harry Hanson, Inc.*, 122 A.D.3d 529, 997 N.Y.S.2d 391 [1st Dept 2014]).

And, although, as the Church points out, the word "negligence" need not appear to effectuate a release, "words conveying a similar import must" (*Geise v. Niagara County*, 117

Misc.2d 470, 458 N.Y.S.2d 162 [Supreme Court, Erie County 1983] *citing Gross v Sweet*, *supra* at 108]). "Language that the Court [of Appeals] suggested would suffice are words referring to the 'neglect' or 'fault' of defendant" (*Geise*, at 472). Here, the Agreement "is in general terms, referring to release from liability for any "damage ... to myself" (*see also Geise*, at 472 (holding as insufficient a release "in general terms, referring to release 'from any liability for any harm, injury, or damage *** including all risks *** whether forseen or unforseen'")). The cases cited by the Church are factually and legally distinguishable.

Therefore, for the reasons noted above, dismissal of the complaint pursuant to the waiver language in the Agreement is unwarranted. And, in this regard, the branch of plaintiff's cross-motion to dismiss the Church's fourth affirmative defense of waiver is granted, as plaintiff has met her burden of showing that the defense is insufficient as a matter of law (*see Chemical Bank v. William Iselin & Co., Inc.*, 162 A.D.2d 160, 556 N.Y.S.2d 574 [1st Dept 1990]).

As to the branch of the Church's motion to dismiss the complaint based on the express assumption of risk found in the Agreement, such assumption of risk language does not bar plaintiff's recovery. A "plaintiff 'expressly' assumes the risk of her injuries when she agrees, in advance, that the defendant 'need not use reasonable care for the benefit of plaintiff'" (*Barber v. Cornell University Co-op. Extension of Orange County*, 37 Misc.3d 1217(A), 961 N.Y.S.2d 356 (Table) [Supreme Court, Orange County 2012]). "In effect, the plaintiff's express consent to the risks involved in the activity eliminates the defendant's duty of care" (*Id.*) "Express assumption of risk is not a factor in the apportionment of damages, but, unless public policy proscribes the agreement limiting liability, acts as a bar to the action by negating any duty on the part of a defendant" (*Mesick v. State*, 118 A.D.2d 214, 504 N.Y.S.2d 279).

Here, the Church alleges that plaintiff expressly assumed the risks of walking in a parking lot during the winter season pursuant to the Agreement (Answer, p. 3).[2] However, the Agreement is silent in this regard. The Agreement simply refers to plaintiff parking her car at the Church's parking lot "at [her] own risk" and does not mention any specific risk in connection with snow and ice that may or may not accumulate thereon (*see Long v. State*, 158 A.D.2d 778, 551 N.Y.S.2d 369 [3d Dept 1990] (finding that the "Waiver and Release" form made "no mention of the specific risks inherent in the jump . . . but simply refers to 'any and all risk' that is 'in connection with this event'" and that 'Certainly, claimant was not apprised of the risks involved in the situation that he was about to encounter")). Having never been made aware of the specific risks involved in parking her vehicle on the Church's parking lot, the Agreement does not bar her claim.

And, to the degree the fifth affirmative defense alleges an implied assumption of risk, such defense does not bar plaintiff's claim. The doctrine of "implied assumption of the risk, does not completely bar recovery, but, consistent with CPLR sec. 1411, diminishes plaintiff's recovery in the proportion to which he may have contributed to his own injuries" (*Fernandez v. City of New York*, 169 Misc.2d 397 645 N.Y.S.2d 1004 [Supreme Court, New York County 1996]; *Gonzalez v. Arc Interior Const.*, 83 A.D.3d 418, 921 N.Y.S.2d 33 [1st Dept 2011] ("comparative

[2] The Church does not argue that the primary assumption risk doctrine, which is applicable to sporting activities, applies to bar plaintiff's action, but relies on the express assumption of risk and implied assumption of risk doctrines (Opposition to Cross-motion, ¶¶29-30)

negligence is not a complete bar to recovery (CPLR 1411)").

Therefore, for the reasons noted above, dismissal of the complaint based on the doctrines of express and implied assumptions of risk is unwarranted. And, the branch of plaintiff's cross-motion to dismiss the Church's fifth affirmative defense assumption of risk is granted.

The Court notes, however, plaintiff's reliance on GOL-5-325[3] as a basis to dismiss the affirmative defense of waiver is unwarranted, as GOL-5-325 does not apply the Agreement. Contrary to plaintiff's contention, and as defendant points out, the statute's bar of exculpatory agreements applies under circumstances giving rise to a bailor-bailee relationship, which is nonexistent herein (*see Rembert v. Co-op. City Parking Garage No. 2*, 86 Misc.2d 399, 381 N.Y.S.2d 160 [Supreme Court, Appellate Term, New York, 1st Dept 1975] (finding GOL 5-325 inapplicable to a license agreement permitting plaintiff to garage his vehicle at defendant's facility where the arrangement "did not rise to the level of a bailment"; "plaintiff could enter and exit at any time without supervision, always selected his own parking space, parked and locked his own car, and retained the keys")). Here, there are no allegations in the Complaint or indication in the Agreement that the Church exercised any "measure of dominion and control" over plaintiff's vehicle to give rise to a bailor-bailee relationship as required under the statute (*Rembert, supra*).[4] *Delucia v Herbee Dodge, Inc.* does not support plaintiff's contention that a bailor-bailee relationship is not required where the loss sounds in personal injury as opposed property damage (19 Misc. 3d 145(A), 867 N.Y.S.2d 16 (Table) [Supreme Court Appellate Term, 2008](citing GOL 5-325(1), once "negligence was established for damage to plaintiff's truck, defendant may not exempt itself from liability for damage to plaintiff's vehicle")).

In light of the the Court's reliance on the complaint and Agreement, conversion of the motion on notice to one for summary judgment is unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Hellenic Orthodox Community of St. Eleutherios, Inc. pursuant to CPLR 3211(a)(5) to dismiss the complaint, and upon notice, pursuant to CPLR 3212 for summary dismissal of the complaint, is denied; and it is further

ORDERED that plaintiff's cross-motion pursuant to CPLR 3211(b) to strike defendant's fourth and fifth affirmative defenses of waiver and assumption of risk, respectively is granted,

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[3] GOL § 5-325 provides:

1. *No person who conducts or maintains for* hire *or other consideration* a garage, *parking lot . . . may exempt himself from liability for damages for injury to person* or property resulting from the negligence of such person . . . and, except as hereinafter provided, *any agreement so exempting such person shall be void.* (Emphasis added).

[4] The Church's claim that it did not charge a specific fee for parking is not dispositive, in that a payment for other services under which parking is considered an attendant benefit constitutes sufficient consideration under the statute (*Mindlin v. Kiamesha Concord, Inc.*, 31 A.D.2d 988, 297 N.Y.S.2d 1008 [3d Dept 1969] (finding that an exculpatory clause was unenforceable where although defendant did not charge a "specific fee for parking, upon taking exclusive control of the automobile and the automobile keys, from the time that the automobile arrived at the hotel door, certainly *the guest's payment for the totality of the services provided by the hotel included 'other consideration' therefor*")).

and the fourth and fifth affirmative defenses are severed and dismissed; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 3/21/17

HON. CAROL R. EDMEAD J.S.C.

J.S.C.

1. CHECK ONE : ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
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