

Lerner v Society for Martial Arts Instruction
2013 NY Slip Op 32283(U)
September 23, 2013
Sup Ct, NY County
Docket Number: 106366/11
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

MICHELLE LERNER,

Plaintiff,

-v-

THE SOCIETY FOR MARTIAL ARTS INSTRUCTION,
FRAN FONTAN and INTERNATIONAL MARTIAL
ARTS CENTER,

Defendants.

INDEX No. 106366/11

MOTION DATE _____

MOTION SEQ. No. 001

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

CROSS-MOTION: _____ YES NO

FILED

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

SEP 26 2013

DECIDED IN ACCORDANCE WITH THE ATTACHED ORDER COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9-23-13

Donna M. Mills

DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

FILEDSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

SEP 26 2013

-----X
MICHELLE LERNER,COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff,

-against-

Index No.

THE SOCIETY FOR MARTIAL ARTS INSTRUCTION,
FRAN FONTAN and INTERNATIONAL MARTIAL
ARTS CENTER,

106366/11

Defendants.
-----X

DONNA MILLS, J. :

Defendant The Society for Martial Arts Instruction (Society) moves for summary judgment dismissing the complaint.

This is a personal injury action. Plaintiff alleges that on May 8, 2010, she was seriously injured while participating in a mixed martial arts class located at Society's premises. Defendant Fran Fontan (Fontan), who rents space from Society, was plaintiff's instructor at that time. Plaintiff alleges in her complaint that she injured her leg while sparring with Fontan during class. She commenced this action to recover damages for alleged negligence on defendants' part.

Society moves for summary judgment, claiming that it is not liable for any negligence. First, it contends that Fontan's relationship with Society is that of an independent contractor, as opposed to an employee. Society states that at no time did Fontan work for Society as an employee, and that he has only leased space from Society to conduct his own classes. Society claims that plaintiff paid for the classes at the beginning of each session directly to Fontan, and understood that the money was for his services.

Society argues that Fontan is liable for plaintiffs' injuries and that his liability cannot be

shifted to it. Society claims that the one of the few exceptions to the independent contractor rule is that of apparent authority, but there is no evidence that plaintiff was led to assume that Fontan was acting as an agent of Society prior to the accident.

Second, Society argues that, due to the exceptionally risky nature of mixed martial arts, plaintiff was constantly aware of hazards related to this sport, and voluntarily assumed certain risks while attending classes. According to Society, plaintiff, at the time of the injury, assumed the risk in participating in these activities. Moreover, Society states that plaintiff had prior experience in the sport, and had known Fontan two years prior to attending his classes. Specifically, Society avers that Fontan was plaintiff's personal trainer prior to her attending the classes.

Third, Society contends that it is absolved of liability because plaintiff executed a waiver agreement before the accident, which expressly relieves Society of such injuries as those alleged in the complaint. According to Society, plaintiff was aware of what she had executed, and has voluntarily waived her right to bring this suit against Society.

In opposition, plaintiff argues that she lacked experience in mixed martial arts, and that there is an issue as to whether Society can be held liable for providing inadequate shin guards as protection for plaintiff. Plaintiff claims that she was wearing these guards during the class when the accident occurred. Plaintiff also claims that the waiver was not valid because there is a question as to whether Society provided a facility that was essentially recreational or instructional. Plaintiff states that, before accepting his services, Society was not provided with sufficient proof of Fontan's expertise in martial arts.

In reply, Society argues that plaintiff had adequate experience in martial arts. Society

states that its rules provide that participants in these classes are suppose to use their own shin guards. Plaintiff allegedly failed to bring her guards and accepted guards in Society's possession. Society contend that the release executed by plaintiff was a valid waiver and that the statement that Society was not properly informed of Fontan's expertise is irrelevant and incorrect.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v Hyman*, 43 AD3d 374, 375 (1st Dept 2007). "The substantive law governing a case dictates what facts are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment [internal quotation marks and citation omitted].'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008). "Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law." *Flores v City of New York*, 29 AD3d 356, 358 (1st Dept 2006). "Once the defendant demonstrates its entitlement to summary judgment, the burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment." *Id.*

Three significant legal issues have been raised by Society in its summary judgment motion, that of the independent contractor rule, the assumption of the risk doctrine and the validity of certain releases. This court shall analyze each issue to determine its validity or relevance in this negligence suit.

"As a general rule, a principal is not liable for the acts of an independent contractor because, unlike the master-servant relationship, principals cannot control the manner in which

independent contractors perform their work.” *Saini v Tonju Assoc.*, 299 AD2d 244, 245 (1st Dept 2002). “However, liability will attach ‘where the employer is negligent in selecting, instructing or supervising the contractor, where the contractor is employed to do work that is inherently dangerous or where the employer bears a specific nondelegable duty [internal citations omitted].” *Leeds v D.B.D. Servs., Inc.*, 309 AD2d 666, 667 (1st Dept 2003). “[O]ne who employs an independent contractor to do work which the employer knows involves special dangers inherent in the work is subject to liability for injuries caused by the failure of an independent contractor to take reasonable precautions against such danger.” *Maristany v Patient Support Servs., Inc.*, 264 AD2d 302, 303 (1st Dept 1999). The nondelegable duty exception to the general rule of nonliability for employers of independent contractors applies “either to statutorily imposed duties or to obligations widely assumed by the public to be imposed by the nature of the employment.” *Id.* at 304.

The parties do not dispute that Fontan is an independent contractor and not an employee of Society. However, plaintiff raises possible issues of fact with respect to exceptions to the general rule. Specifically, plaintiff argues about Society’s selection of Fontan for the instructor’s position, in light of the special dangers allegedly inherent in this particular sport.

Plaintiff relies on the deposition testimony of Society’s executive director Michelle Gray (Gray). Gray stated that, prior to his services at Society, Fontan did not provide documentation concerning his skill level, nor did he provide any references. However, as Society points out in its reply papers, Gray also testified that she spoke to people who trained alongside Fontan, and viewed his website, which listed certificates in personal training and different levels of martial arts accomplishments. She also testified that she had spoken to his teacher, Professor Jucao.

Society also provides a copy of plaintiff's deposition testimony where she states that she had known Fontan prior to the classes she attended at Society's premises. Prior to the accident, plaintiff stated that she had attended Fontan's classes for seven months, starting in mid-October, 2009.

The evidence raises questions of fact as to whether Society was negligent in selecting Fontan as an instructor, considering the dangerous nature of the work he was selected to do.

The next issue concerns whether plaintiff assumed the risk of her injuries. "Assumption of risk requires both knowledge of the defect and also an appreciation of the resultant risk. Among many factors to be considered in determining the risk involved are the particular skill and experience of a plaintiff and whether the plaintiff is a professional or amateur athlete."

Radwaner v USTA Natl. Tennis Ctr., 189 AD2d 605, 605 (1st Dept 1993). While participants in athletic events are to assume the risk of injury normally associated with a sport, they "will not be deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risks." *Hernandez v Castle Hill Little League*, 256 AD2d 241, 242 (1st Dept 1998).

Plaintiff argues that she did not assume the risks of Fontan's allegedly reckless or intentional conduct leading up to the accident. She also argues that Society's provision of allegedly inadequate shin guards contributed to the injuries. She indicates that these guards created a dangerous condition over and above the usual dangers inherent in the sport.

Plaintiff, as a participant in a sport such as martial arts, is assumed to have been aware that she could be injured as a result of her involvement. In order to relieve herself of assuming the risk of injury, she would have to allege that the risk that resulted in her injury was one that

was of an unusual or reasonably unforeseeable nature. *See Saravia v Makkos of Brooklyn*, 264 AD2d 576, 577 (1st Dept 1999). In her opposition papers, plaintiff contends that the poor quality of the guards provided to her by Society contributed to her injuries. The court finds that plaintiff raises an issue of fact as to whether or not Society, in providing the shin guards, created a risk that was exceptional enough to constitute a special risk not ordinarily assumed by a participant in mixed martial arts.

The final issue under discussion concerns whether the release that plaintiff executed prior to the accident bars her from suing Society. Society claims that the release served as a legal waiver of any personal injury claims she could bring against Society. “[A]s a general rule, when a release is clear and unambiguous on its face and knowingly and voluntarily entered into, it will be enforced as a private agreement between the parties.” *L & K Holding Corp. v Tropical Aquarium at Hicksville*, 192 AD2d 643, 645 (2d Dept 1993). However, section 5-326 of the General Obligations Law provides that releases which exempt an owner for its own liability are void against public policy if they are related to recreational establishments. Under the language of the statute, such establishments include pools, gymnasiums, and places of public amusement or recreation. This statute does not apply to instructional establishments where, for example, a fee is paid for a course of instruction. *See Boateng v Motorcycle Safety School, Inc.*, 51 AD3d 702, 703 (2d Dept 2008); *Baschuk v Diver’s Way Scuba*, 209 AD2d 369, 370 (2d Dept 1994).

From the evidence provided here, it is clear that Society provides instructional services to students like plaintiff, and that section 5-326 is not applicable. A copy of the release is submitted by Society. The language of the document is unambiguous with respect to liability. Plaintiff’s signature is on the release, and in her opposition papers, plaintiff has not alleged fraud or mistake

as a defense. The court finds that the release is valid and that plaintiff voluntarily relinquished her right to sue Society for negligence. In consequence, the action must be dismissed.

Accordingly, it is

ORDERED that defendant The Society for Martial Arts Instruction's motion for summary judgment dismissing the complaint is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the remainder of this action is severed and continues against the remaining defendants Fran Fontan and International Martial Arts Center.

DATED: 9-23-13

FILED

SEP 26 2013

ENTER:

COUNTY CLERK'S OFFICE
NEW YORK

-----*Donna M. Mills*-----

J.S.C.

DONNA M. MILLS, J.S.C.