SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice PART 7

SAAD JAFRI,

Plaintiff,

- against -

EQUINOX HOLDINGS, INC. and RYAN HOPKINS,

Defendants.

INDEX NO. 161508/13

MOTION SEQ. NO. 001

The following papers were read on this motion by the defendant Ryan Hopkins to dismiss the complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☐ Yes ■ No

In this personal injury lawsuit, defendant Ryan Hopkins (Hopkins) moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) and for costs and fees pursuant to 22 NYCRR § 130-1.1(a).

This action arises from an injury that Saad Jafri (plaintiff) allegedly sustained on December 15, 2010 while exercising at an Equinox fitness club owned by defendant Equinox Holdings, Inc. (Equinox) located on Prince Street in Manhattan. The complaint alleges that plaintiff sustained a permanent injury to his back while he was working out and being trained by defendant Hopkins, then employed by Equinox as a personal trainer.

It is alleged that Hopkins was negligent in causing and instructing the plaintiff "to perform squats with a heavy weighted barbell, that involved a 'fishing manuever' [sic]" (Complaint, ¶ 21). Hopkins then:

> "negligently caused and instructed the plaintiff, who was now in a weakened condition, to do 'eccentric pulls,' which involved plaintiff running on the floor of

> the gym away from the trainer while the trainer pulled back on a large rubber-band that was wrapped around the plaintiff's waist." (*id.*, ¶ 22).

At this point, plaintiff allegedly felt a pop in his lower back and the work-out ended. He then went to the Union Square Equinox for a deep tissue massage, thinking it was a muscle problem. A short time thereafter, he was unable to walk, called an ambulance and was brought to and treated at the emergency room of Beth Israel Hospital. The complaint alleges that Equinox had notice that Hopkins used training methods that were dangerous to the members he trained (*id.*, ¶ 14), and that complaints had been made to management about Hopkins (*id.*, ¶ 29). Plaintiff allegedly warned Hopkins that he had "a low back weakness," but that Hopkins ignored these warnings (*id.*, ¶ 26). He further alleges that Hopkins "failed to give plaintiff simple and beginner workouts with no controversial exercises" (*id.*, ¶ 27).

Hopkins now moves to dismiss the complaint based on documentary evidence, namely the complaint and plaintiff's "Membership Agreement" with Equinox dated September 20, 2008. Hopkins argues that plaintiff's negligence claim must be dismissed, because it is directly contradicted by the "Member Health Warranty" (Health Warranty) that plaintiff signed in order to use the facilities at Equinox and participate in Hopkins' training program. This warranty provision reads as follows:

> "MEMBER'S HEALTH WARRANTY: Member and buyer represent that Member is in good health and has no disability, impairment, injury, disease or ailment preventing him/her from engaging in active or passive exercise or which would cause increased risk or injury or adverse health consequences as a result of naïve or abusive exercise. Member assumes full responsibility for his or her use of the facility and shall indemnify Equinox Fitness Clubs, the owner of the club location the member is utilizing, its affiliates, agents and employees against any and all liability arising out of the use of its facilities." (Amended Declaration of George Vallas dated April 24, 2014, Ex. B at 2, ¶ 3).

Hopkins further argues that the complaint fails to state a cause of action, because it "presents a paradigmatic example of the doctrine of assumption of risk" (Amended Memorandum of Law, at 8).

Finally, Hopkins argues that the complaint is totally frivolous within the meaning of 22 NYCRR 130-1.1(c) and seeks an award of costs and fees. Hopkins contends that a Facebook post published by the plaintiff on or about November 10, 2013 proves that this action was filed for the sole intention of harassment. In this post, plaintiff states, among other things, that he intended to file suit against Equinox, because he wanted to "burn a single, idiot trainer," and that, in reference to a separate lawsuit by Equinox against Hopkins, who has since left Equinox and opened a competing gym with two other trainers, "we're all going to enjoy watching you burn" (Amended Declaration of George Vallas dated April 24, 2014, exhibit C).

In opposition to the motion, plaintiff submits an affidavit in which he avers that he never agreed to waive liability for any negligence on the part of the defendants, that his accident was caused solely by "providing [him] with a trainer with inadequate qualifications and who negligently trained me to sustain serious personal injuries" (Affidavit of Saad Jafri sworn to on June 14, 2004, ¶ 3).

The assumption of the risk defense is based on the proposition that "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). "[A]wareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff" (*Maddox v City of New York*, 66 NY2d 270, 278 [1985]; *see also Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 657–658 [1989]; *Turcotte v Fell*, 68 NY2d 432, 440 [1986]; *Latimer v City of New York*, 118 AD3d 420, 421 [1st Dept 2014]).

When applicable, the assumption of risk doctrine "is not an absolute defense but a measure of the defendant's duty of care" (*Turcotte v Fell*, 68 NY2d at 439). A gym or athletic facility cannot evade responsibility for negligent behavior "'by invoking a generalized

assumption of risk doctrine as though it was some sort of amulet that confers automatic immunity'" (*Mellon v Crunch & Agt Crunch Acquisition, LLC*, 32 Misc 3d 1214(A) *4, 2011 NY Slip Op 51289[U] [Sup Ct, Kings County 2011], quoting *Livshitz v United States Tennis Assn. Natl. Tennis Ctr.*, 196 Misc 2d 460, 466 [Civ Ct, Queens County 2003]). In a case with similar facts, the Appellate Division upheld the denial of summary judgment to a health club and a personal trainer sued by a member injured while lifting 270 pounds allegedly at the urging of the trainer (*Mathis v New York Health Club*, 261 AD2d 345 [1st Dept 1999]). Even though the plaintiff in *Mathis* was not a novice to weight training, the court reasoned that he "cannot be said to have assumed risks in excess of those usually encountered in the activity, particularly unreasonably increased risks attributable to lapses in judgment by a trainer whose qualifications . . . were [allegedly] not all they had been represented to be by defendant health club" (*id.* at 346).

Defendant's reliance on the assumption of risk doctrine to support a pre-answer dismissal of the complaint in this case is misplaced. Whether plaintiff's back injury is a risk commonly and inherently associated with weight training and whether plaintiff had an appreciation of the risk is not self-evident from the complaint. It is alleged that Hopkins "failed to give plaintiff simple and beginner workouts with no controversial exercises" (Complaint, ¶ 27), suggesting that plaintiff was new to weight training and not experienced. The complaint also alleges that Hopkins had plaintiff performing weight training exercises that were not suitable for a person with "low back weakness" and that the exercises were "dangerous, unsafe" and "failed to meet the minimum standard of care in the personal training industry" (*id.*, ¶¶ 26, 29). Numerous facts such as whether plaintiff was experienced with weight training, the length of time he had been a member of Equinox or other health clubs, his general level of fitness, how and when he developed "low back weakness," whether this was his first training session with Hopkins or any other personal trainer, whether he had previously performed these or similar

exercises with or without incident or injury in the past, and when and how he allegedly advised Hopkins of his "low back weakness," are all questions of fact that must be developed through discovery in order for this court to properly evaluate a defense based on assumption of risk (*see e.g. Layden v Plante*, 101 AD3d 1540 [3d Dept 2012]). Hopkins' motion to dismiss pursuant to CPLR 3211(a)(7), premised on the doctrine of assumption of risk, is denied without prejudice to renewal after discovery is completed.

Hopkins' second ground for dismissal is based on the Health Warranty in plaintiff's membership agreement. Defense counsel argues that, "although Plaintiff was fully aware of his medical condition, he nevertheless falsely and fraudulently represented to Equinox, and by extension, to Mr. Hopkins, that he had no 'impairment or injury' that would prevent him from using the facilities of the club" (Amended Memorandum of Law, at 6). This statement assumes a host of facts that are not in the record. First, the membership agreement was signed in September 2008 and plaintiff's accident occurred more than two years later. Plaintiff's back problems could have started after he joined Equinox, and nothing in the membership agreement requires a member to update the club on his or her general health. Even if it did, the complaint alleges that plaintiff did advise Hopkins that he had "a low back weakness,"and that Hopkins ignored the warnings. Whether plaintiff's medical condition was the sole and proximate cause of his injury or whether Hopkins' allegedly negligent training of the plaintiff in light of his pre-existing condition caused the injury is an unresolved question of fact.

The facts in *Feeney v Manhattan Sports Club* (227 AD2d 293 [1st Dept 1996]), cited by Hopkins in support of dismissal of the complaint, are distinguishable. In that case, the plaintiff injured his shoulder while engaging in weightlifting exercises even though he had previously dislocated the shoulder on a number of prior occasions, and had undergone reconstructive surgery to remedy it. Prior to the injury, he asked his personal trainer whether the use of free weights would cause re-injury to his shoulder and was assured that the plaintiff "'would have no

problem'" (227 AD2d at 294). The court held that, given the plaintiff's awareness of his condition and the fact that the membership agreement he signed expressly acknowledged that health club employees were not qualified to diagnose, examine or treat any medical condition, or make any other such evaluation or recommendation, the plaintiff assumed the risk of re-injuring his shoulder which was a foreseeable consequence of his participation in weight lifting and that summary judgment in the defendants' favor was warranted.

Plaintiff argues that waiver of liability in the Health Warranty is void against public policy pursuant to section 5-326 of the General Obligations Law (GOL). Hopkins argues that this law applies only to institutions and individuals that serve a recreational purpose, and that GOL § 5-326 does not apply here because the services provided by Equinox and Hopkins were instructional in nature, relying on *Baschuk v Diver's Way Scuba* (209 AD2d 369 [2d Dept 1994]). GOL § 5-326 provides that:

> Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator 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.

The First Department has squarely ruled that GOL § 5-326 applies to injuries sustained by a member of a health club while being instructed by a trainer (*see Connolly v Peninsula Group*, 48 AD3d 365 [1st Dept 2008]; *Debell v Wellbridge Club Mgt., Inc.*, 40 AD3d 248 [1st Dept 2007]). However, "[a]n agreement that seeks to release a defendant from the consequences of his or her own negligence must plainly and precisely state that it extends this far" (*Layden v Plante*, 101 AD3d at 1543 [internal quotation marks and citations omitted]; *see also Gross v Sweet*, 49 NY2d 102, 110 [1979]). The general waiver of liability language of the Health

Warranty makes no reference to any negligence or fault of Equinox employees or agents, but merely states in general terms that the member assumes full responsibility for his or her use of Equinox facilities. The Health Warranty does not bar plaintiff's claim that the defendants' negligence caused his injury.

The Court now turns to the portion of Hopkin's motion which seeks for costs and fees pursuant to 22 NYCRR 130-1.1(c). Part 130 of the Rules of the Chief Administrator permits courts to sanction attorneys for engaging in frivolous conduct, which includes conduct: (1) "completely without merit in law"; (2) "undertaken primarily to... harass or maliciously injure another"; or (3) "assert[ing] material factual statements that are false" (*see* 22 NYCRR § 130-1.1; *Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). The Court does not find that plaintiff's conduct was frivolous within the meaning of 22 NYCRR § 130-1.1, and as such this portion of Hopkin's motion is denied.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that defendant Ryan Hopkins' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) is denied; and it is further

ORDERED that defendant Ryan Hopkins is directed to serve and file an answer to the complaint within twenty (20) days of service of a copy of this order with notice of entry; and it is further

ORDERED that defendant Ryan Hopkins' request ~~for costs and fees~~ pursuant to 22 NYCRR 130-1.1(a) is denied.

Dated: 12/3/14

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**