| **Gosh v RJMK Park LLC** |
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| 2016 NY Slip Op 30035(U) |
| January 7, 2016 |
| Supreme Court, New York County |
| Docket Number: 155024/2015 |
| Judge: Cynthia S. Kern |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SLAVA GOSH, and IRINA GOSH, as parents and natural guardians of A.G., an infant, and SLAVA GOSH, and IRINA GOSH, Individually,

Plaintiffs,

Index No. 155024/2015

-against-

**DECISION/ORDER**

RJMK PARK LLC, RJRH PARK LLC, DIAMOND PROPERTIES LLC, and DP 21, LLC,

Defendants.

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**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed | 1 |
| Affirmation in Opposition | 2 |
| Replying Affidavits | 3 |
| Exhibits | 4 |

Plaintiffs commenced the instant action seeking damages for personal injuries allegedly sustained by infant plaintiff A.G. as a result of an accident that occurred on or about January 31, 2015 at a trampoline park in Westchester County, New York. Defendants RJMK Park LLC and RJRH Park LLC (the "moving defendants") now move for an order pursuant to CPLR §§ 501, 510 and 511 changing venue from New York County to Westchester County. For the reasons set forth below, the moving defendants' motion is granted.

The relevant facts are as follows. On or about January 23, 2015, plaintiff Irina Gosh electronically signed an agreement (the "Agreement") with defendant RJMK Park LLC to allow infant plaintiff A.G. to participate in activities at the Rockin' Jump facility in Mt. Kisko, Westchester County, New York, owned by RJMK Park LLC (hereinafter "Rockin' Jump"). On or

about January 31, 2015, infant plaintiff A.G. was injured while playing a game of "trampoline dodgeball" at the Rockin' Jump facility. Paragraph 2 of the Agreement contained the following clause purporting to release Rockin' Jump from liability:

> Despite all known and unknown risks, I hereby expressly and voluntarily remise, release, acquit, satisfy, and forever discharge Rockin' Jump on my own behalf, that of my child(ren)/ward(s), and anyone acting on my and/or my child(ren)/ward(s)' behalf and agree to hold Rockin' Jump harmless from all manner of action(s) or omission(s), cause(s) and cause of action...including, but not limited to, any and all claims which allege negligent acts and/or omissions committed by Rockin' Jump...

The Agreement also provided in paragraph 7 as follows:

> [i]n the event a lawsuit is filed against Rockin' Jump, I agree to the sole and exclusive venue of the County of Westchester. I further agree that the substantive law of New York shall apply without regard to any conflict of law rules. I also agree that if any portion of this agreement is found to be void or unenforceable, the remaining portion shall remain in full force and effect.

The moving defendants move for an order changing venue pursuant to CPLR § 501, which provides that a "written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial." Forum selection clauses, including clauses selecting venue, are "*prima facie* valid" and "are not to be set aside unless a party demonstrates that the enforcement of such 'would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court.'" *Sterling Natl. Bank v. Eastern Shipping Worldwide, Inc.*, 35 A.D.3d 222 (1st Dept 2006) (internal citations omitted).

In the present case, the moving defendants' motion for an order changing venue pursuant to CPLR § 501 is granted as the parties have entered into a written agreement fixing the place of trial in Westchester County before the action was commenced and plaintiffs have failed to demonstrate any

grounds for invalidating the forum selection clause. Plaintiffs have failed to make any showing that this forum selection clause is unreasonable or unjust, was obtained through fraud or overreaching or that a trial in Westchester County would be "so gravely difficult and inconvenient" that plaintiffs would be deprived of their day in court.

Plaintiffs' argument that the forum selection clause in the Agreement is invalid on the ground that the Agreement itself is void pursuant to General Obligations Law § 5-326, which invalidates certain agreements purporting to release the owners or operators of recreational facilities from liability for negligence, is without merit. Initially, the court finds that the provision in the Agreement releasing Rockin' Jump from liability for its own negligence is unenforceable pursuant to General Obligations Law § 5-326, which provides as follows:

> [e]very 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.

Although plaintiffs are correct in their assertion that the provision in the Agreement between the parties releasing Rockin' Jump from liability for its negligence is unenforceable, plaintiffs have not established that the entire agreement is void based on the unenforceable provision. Where an agreement consists partially of an unlawful objective, "the court may sever the illegal aspect and enforce the legal one, so long as the illegal aspects are incidental to the legal aspects and are not the main objective of the agreement." *Mark Hotel LLC v. Madison Seventy-Seventh LLC*, 61 A.D.3d 140, 143 (1st Dept 2009) (internal citations omitted). "[W]hether the provisions of a contract are

severable depends largely upon the intent of the parties as reflected in the language they employ and the particular circumstantial milieu in which the agreement came into being." *Matter of Wilson's Estate*, 50 N.Y.2d 59, 65 (1980).

In the present case, the court finds that the unlawful provision in the Agreement releasing Rockin' Jump from liability is severable from the remainder of the Agreement on the ground that the unlawful provision is incidental to the legal aspects and not the main objective of the Agreement. The illegal objective to release Rockin' Jump from liability is incidental to the legal objectives in the Agreement, which include indemnification provisions, a photo release, a choice of law provision and the forum selection clause. Further, the provision in the Agreement that "if any portion of this agreement is found to be void or unenforceable, the remaining portion shall remain in full force and effect" reflects the intent of the parties that the legal provisions of the Agreement be severed from any provisions determined to be illegal.

Accordingly, the moving defendants' motion to change venue from New York County to Westchester County is granted. It is hereby

ORDERED that venue of this action is changed from this Court to the Supreme Court, County of Westchester, and upon service by movants of a copy of this order with notice of entry and payment of appropriate fees, if any, the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of the Supreme Court, County of Westchester. This constitutes the decision and order of the court.

Dated: 1/7/16

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.