At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of April, 2016.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

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MEGHAN MCDONALD,

Plaintiff,

- against -

Index No.503314/12

BROOKLYN BOULDERS, LLC.,

Defendant.

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The following papers numbered 1 to 4 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3
Reply Affidavits (Affirmations)	4
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, defendant Brooklyn Boulders, LLC (defendant or Brooklyn Boulders) moves for an order: 1) pursuant to CPLR §3212 granting summary judgment and the dismissal of plaintiff Meghan McDonald's complaint against defendant; and 2) pursuant to CPLR §3025 (b) granting defendant leave to amend its answer to the complaint to include an additional affirmative defense.

Background

Plaintiff is employed as a program director and head coach of a youth rock climbing team at The Rock Club, an indoor rock climbing gym in New Rochelle, New York and has been so employed since 2006. On September 1, 2011, plaintiff went to Brooklyn Boulders with some of the members of her youth climbing team and other adults. Brooklyn Boulders is an indoor rock climbing and bouldering facility located in Brooklyn, New York. Plaintiff testified that this trip was a treat for her team and that she would be climbing that day too. It is undisputed that plaintiff signed a waiver before she began climbing and that she did not pay an entry fee pursuant to a reciprocal agreement in place between The Rock Club and Brooklyn Boulders as well as other rock climbing facilities. After approximately one and a half hours of bouldering with her team, plaintiff went to an area of the bouldering wall known as The Beast, which is very challenging in that it becomes nearly horizontal for some distance. It was her first time on the Beast, although she had been to Brooklyn Boulders on prior occasions. Plaintiff testified that she visually inspected the area below the Beast before she began her climb. Lance Pinn, the Chief Marketing Officer, President and founder of Brooklyn Boulders testified that there was foam matting system in place, with matting wall to wall in the area of the Beast. The largest pieces available were 9 feet by 7 feet so the area where the foam pieces met when placed on the ground was covered with Velcro to keep the foam matting pieces flush together.

Plaintiff finished her upward climb and then climbed down as far as she could and then looked down below to make sure there were no shoes in her way and that her spotter was out of the way. She stated that she knew that there were mats underneath so she jumped down a distance of approximately five feet. Her right foot landed on the mat but her left foot landed on the Velcro strip where two floor mats met. She testified that her left foot went through the Velcro into a space between the two mats. Plaintiff sustained an ankle fracture as a result and required surgeries and physical therapy.

Brooklyn Boulders' Motion

Brooklyn Boulders moves for an order: 1) pursuant to CPLR §3212 granting summary judgment and the dismissal of plaintiff's complaint against defendant; and 2) pursuant to CPLR §3025 (b) granting defendant leave to amend its answer to the complaint to include an additional affirmative defense.

Defendant argues that the liability waiver that plaintiff signed when she entered the facility releases it from liability. Defendant maintains that plaintiff was an expert climber and coach and understood the meaning of the waiver and appreciated the assumption of risk involved in the activity that she was engaged. Defendant also points out that she did not pay a fee to climb that day based upon the reciprocal program in place with other climbing facilities. Defendant claims that plaintiff was instructing her students that day as they observed her climbing and point to her testimony as follows:

> Q: And were you teaching them, you know, what to do and what not to do?
>
> A: I wasn't teaching them, but if they had a question they would ask me hey, should I do this or do this or what do you think of this move I always give advice. (Page 30, lines 12-17).
>
> Q. Did you ever teach any or give any instruction there?
>
> A. Just of terms of like in my kids I probably give instruction everywhere I go. There are so many people that climb at Brooklyn Boulders that are total beginners. I'm often spotting brand new people and telling them how to spot one another. (Page 45, lines 5-12).

Defendant notes that although General Obligations Law (GOL) §5-326 renders contract clauses which release certain entities from liability void as against public policy, activities which are "instructional" as opposed to recreational are found to be outside the scope of GOL §5-326. Defendant maintains that here, plaintiff was at Brooklyn Boulders to instruct her team members and thus GOL §5-326 is not applicable. Moreover, defendant argues that the waiver at issue was explicit, comprehensive and expressly provided that Brooklyn Boulders was released from liability for personal injuries arising out of or connected with plaintiff's participation in rock climbing.

In support of its motion, defendant submits the signed waiver which states, in pertinent part:

> I acknowledge that climbing on an artificial climbing wall entails known and unanticipated risks which could result in physical or emotional injury, paralysis, death, or damage to myself, to property, or third parties. I understand that such risks simply cannot be eliminated without jeopardizing the essential

> qualities of the activity. I have examined the Climbing Wall and have full knowledge of the nature and extent of the risks associated with rock climbing and the use of the Climbing Wall, including but not limited to:
> a:. All manner of injury resulting from my falling off or from the Climbing Wall and hitting the floor, wall faces, people or rope projections, whether permanently or temporarily in place, loose and/or damaged artificial holds, musculoskeletal injuries and/or overtraining; head injuries; or my own negligence . . .
> I further acknowledge that the above list is not inclusive of all possible risks associated with the Climbing Wall and related training facilities and I agree that such list in no way limits the extent or reach of this Assumption of Risk, Release and Indemnification . . .

Defendant also argues that since plaintiff did not pay a fee to climb that day that her activity was outside the scope of GOL §5-326.

Next defendant argues that the assumption of risk doctrine bars plaintiff's claims because, as a general rule, a plaintiff who voluntarily participates in a sporting or recreational event is held to have consented to those commonly appreciated risks that are inherent in, and arise out of, the nature of the sport generally and flow from participation in such event.

Finally, defendant argues that it should be allowed to amend its answer to assert the affirmative defense of release. Defendant contends that it was unaware of the existence of the release and waiver when it served its answer. Moreover, defendant contends that plaintiff will not be prejudiced because she was, in fact, questioned about the release that she signed during her deposition.

Plaintiff opposes defendant's motion arguing that General Obligations Law §5-326 renders the waiver and release that she signed void. She points out that defendant is attempting to circumvent this law by asserting that the activity in which plaintiff was involved was instructional as opposed to recreational and misstates her testimony in an attempt to mislead the court. Plaintiff contends that such behavior should be sanctioned. In support of her position that she was not at Brooklyn Boulders for instructional purposes, but, rather was there for a fun day of climbing, plaintiff points to her testimony that she brought some of the older members of her team to Brooklyn Boulders to climb. She testified that they all worked at The Rock Club so this was an end of summer treat for them to go and climb somewhere else and not have to work. (Page 62, lines 5-13). She further points to the following testimony:

> Q: In September of 2011 when you went there on the date in question what was your purpose of being there?
>
> A: I went there with a handful of kids who are on my climbing team, but it wasn't a specific training day. Usually when we go it would be for training but this was just like a fun day. I was going to climb with them.
>
> Q: And were they climbing around you.
>
> A: Yeah, they were.(page 29, lines 14-25).
>
> Q: And were you supervising them?
>
> A: I wasn't their active supervisor. I'm a coach though so I'm always watching what they do. But this was one of the few times that I was actually going to be climbing so it was kind of a treat for them I guess to be able to climb with me.

> Q: Were they watching you?
>
> A: A few of them were watching me yeah.
>
> Q: And were you teaching them, you know, what to do and what not to do?
>
> A: I wasn't teaching them, but if they had a question they would ask me hey, should I do this or do this or what do you think of this move I always give advice (page 30, lines 2-17).

Plaintiff also contends that defendant incorrectly argues that GOL §5-326 does not apply because she cannot be classified a user since she did not pay to climb that day. In this regard, plaintiff contends that she is indeed a user and the law is applicable because there was a reciprocal agreement between the gym at which she was employed and Brooklyn Boulders pursuant to which employees were not required to pay a fee to use either gym. Thus, she contends the value of the reciprocity agreement is the compensation.

Next, plaintiff argues that the assumption of risk doctrine is not applicable where the risk was un-assumed, concealed or unreasonably increased. Plaintiff argues that the question of whether the gap in the mats at Brooklyn Boulders is a commonly appreciated risk inherent in the nature of rock climbing necessitates denial of the summary judgment motion. She claims that she did not assume the risk that there would be a gap in the matting that was in place as protection from a fall. Moreover, plaintiff maintains that defendant fails to proffer any evidence demonstrating when the mats were last inspected prior to plaintiff's accident.

Plaintiff argues that issues as to whether dangerous or defective conditions exist on property and whether the condition is foreseeable can only be answered by a jury. Thus, she

contends that whether the condition of the mats was dangerous and/or defective is an issue of fact and that defendant has failed to proffer any evidence that the mats were in a reasonably safe condition.

Finally, plaintiff opposes defendant's request to amend its answer to add the affirmative defense of waiver. Plaintiff argues that the existence of the waiver was known and that it is disingenuous at best to assert otherwise. Plaintiff contends that this request, post note of issue, is highly prejudicial to plaintiff.

In reply, defendant argues that plaintiff's demand for sanctions lacks merit and that plaintiff's testimony establishes that she was in fact, instructing her students when her accident occurred. Defendant contends that the waiver applies. Next defendant claims that as far as inspection of its equipment it had a route setting department that checked its walls and mats and that bouldering climbers were responsible for enuring their own safety when climbing. Finally, defendant argues that the assumption of risk doctrine applies and that plaintiff visually inspected the area before the accident and that the Velcro covers were visible and moreover, she had the option to use additional mats underneath her while climbing. Defendant further contends that the mats did not constitute a dangerous condition. Finally, Brooklyn Boulders reiterates its request for leave to amend its answer to assert the affirmative defense.

Discussion

Leave to Amend

Generally, in the absence of prejudice or surprise to the opposing party, leave to amend pleadings should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*Yong Soon Oh v Hua Jin*, 124 AD3d 639, 640 [2015]; *see Jones v LeFrance Leasing Ltd. Partnership*, 127 AD3d 819, 821 [2015]; *Rodgers v New York City Tr. Auth.*, 109 AD3d 535, 537 [2013]; *Schwartz v Sayah*, 83 AD3d 926, 926 [2011]). A motion for leave to amend is committed to the broad discretion of the court (*see Ravnikar v Skyline Credit-Ride, Inc.*, 79 AD3d 1118, 1119 [2010]). However, where amendment is sought after the pleader has filed a note of issue, "a trial court's discretion to grant a motion to amend should be exercised with caution" (*Harris v Jim's Proclean Serv., Inc.*, 34 AD3d 1009,1010 [3d Dept 2006]).

Here, while the court is not satisfied with counsel's explanation that he was unaware of the existence of the release and waiver signed by plaintiff at the time that the original answer was served, the court notes that plaintiff was questioned about the release and waiver during her May 6, 2014 deposition so the court finds that there is no surprise of prejudice in allowing defendant leave to serve its amended answer and assert the affirmative defense of release and waiver. Accordingly, that branch of defendant's motion seeking leave to amend its answer to the complaint to include this affirmative defense is granted.

General Obligations Law §5-326

GOL §5-326 states 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.

Such contracts or agreements are void as against public policy unless the entity can show that its facility is used for instructional purposes as opposed to recreational purposes. "The legislative intent of the statute is to prevent amusement parks and recreational facilities from enforcing exculpatory clauses printed on admission tickets or membership applications because the public is either unaware of them or not cognizant of their effect (*see Lux v Cox*, 32 F.Supp.2d 92, 99 [1998]; *McDuffie v Watkins Glen Intl.*, 833 F Supp. 197, 202 [1993]). Facilities that are places of instruction and training (*see e.g. Millan v Brown*, 295 AD2d 409, 411 [2002]; *Chieco v Paramarketing, Inc.*, 228 AD2d 462, 463 [1996]; *Baschuk v Diver's Way Scuba*, 209 AD2d 369, 370 [1994]), rather than "amusement or recreation" (*see e.g. Meier v Ma-Do Bars*, 106 AD2d 143, 145 [1985]), have been found to be outside the scope of the statute. "In assessing whether a facility is instructional or recreational, courts have

examined, inter alia, the organization's name, its certificate of incorporation, its statement of purpose and whether the money it charges is tuition or a fee for use of the facility" (*Lemoine v Cornell Univ.*, 2 AD3d 1017, 1019 [2003], lv denied 2 NY3d 701 [2004]). In cases involving a mixed use facility, courts have focused less on a facility's ostensible purpose and more on whether the person was at the facility for the purpose of receiving instruction (*Id.* At 1019; *see Scrivener v Sky's the Limit*, 68 F Supp 2d 277, 281 [1999]; *Lux v Cox*, 32 F Supp 2d at 99). Where a facility "promotes . . . a recreational pursuit, to which instruction is provided as an ancillary service," General Obligations Law § 5-326 applies even if the injury occurs while receiving instruction (*Debell v Wellbridge Club Mgt., Inc.*, 40 AD3d 248, 249 [2007]; *Bacchiocchi v Ranch Parachute Club*, 273 AD2d 173, 175 [2000]).

Here, defendant asserts that GOL §5-326 is not applicable because plaintiff was at Brooklyn Boulders to instruct her team members. The court disagrees. Plaintiff's testimony establishes that she was at Brooklyn Boulders with her team for a day of fun and not to teach them how to climb. Her testimony that she would give advice to the students if they asked does not rise to the level of providing rock climbing instruction on that day. Moreover, the court notes that the cases invloving the exemption for instrctional activities generally involve the person being instructed sustaining an injury and not the person who was providing the instruction. In addition, the court finds defendants's argument that the fact that plaintiff did not pay a fee that day renders GOL §5-326 not applicable is equally unavailing. The reciprocal agreement that was in place between Brooklyn Boulders and The Rock Club,

where plaintiff was employed, which allowed such employees to use other bouldering facilities without being charged a fee was a benefit of their employment and thus could be considered compensation. Accordingly, the court finds that the release and waiver signed by plaintiff is void pursuant to GOL §5-326.

Assumption of Risk

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]; *Paone v County of Suffolk*, 251 AD2d 563 [2d Dept 1998]), including the injury-causing events which are the known, apparent, or reasonably foreseeable risks of the participation (see *Rosenbaum v Bayis Ne'Emon Inc.*, 32 AD3d 534 [2d Dept 2006]; *Colucci v Nansen Park, Inc.*, 226 AD2d 336 [2d Dept 1996]). A plaintiff is deemed to have given consent limiting the duty of the defendant who is the proprietor of the sporting facility "to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" (*Turcotte v Fell*, 68 NY2d 432 [1986]). Stated otherwise, the duty of the defendant is to protect the plaintiff from injuries arising out of unassumed, concealed, or unreasonably increased risks (*see Manoly v City of New York*, 29 AD3d 649 [2d Dept 2006]; *Pascucci v Town of Oyster Bay*, 186 AD2d 725 [2d Dept 1992]). It is well settled that "awareness 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 [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). Thus, "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'" (*Jafri v Equinox Holdings, Inc.*, 2014 N.Y. Misc. LEXIS 5330, 4-5 [Sup. Ct, New York County quoting *Mellon v Crunch & Agt Crunch Acquisition, LLC*, 32 Misc 3d 1214(A) [Sup Ct, Kings County 2011]; *Livshitz v United States Tennis Assn. Natl. Tennis Ctr.*, 196 Misc 2d 460, 466 [Sup Ct, Queens County 2003]).

Furthermore, "in assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport'" (*Morgan*, 90 NY2d at 485, *quoting Owen v R.J.S. Safety Equip.*, 79 NY2d 967, 970 [1992]; *Georgiades v Nassau Equestrian Ctr. at Old Mill, Inc.*, 134 AD3d 887, 889 [2d Dept 2015]; *Weinberger v Solomon Schechter Sch. of Westchester*, 102 AD3d 675, 678 [2d Dept 2013]). Participants, however, do not assume risks which have been unreasonably increased or

concealed over and above the usual dangers inherent in the activity (*see Morgan*, 90 NY2d at 485; *Benitez*, 73 NY2d at 657-658; *Muniz v Warwick School Dist.*, 293 AD2d 724 [2002]).

In this regard, the court finds that plaintiff has raised a question of fact regarding whether the condition of the mats, with the Velcro connection, increased the risk in the danger of the activity and caused a concealed dangerous condition. Thus it cannot be said that plaintiff assumed the particular risk that was present and caused her injuries.

Based upon the foregoing, that branch of Brooklyn Boulders motion seeking summary judgment dismissing plaintiff's complaint is denied.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE