Supreme Court of the State of New York
County of Kings

Part 91

ISHA ALIBEY,

Plaintiff,

against

TOUGH MUDDER INCORPORATED D/B/A/ URBAN MUDDER,

Defendant.

Index Number 512947/2016
SEQ#001 & 003

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed.....	1, 2
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits.....	2, 3
Replying Affidavits.....	
Exhibits.....	
Other	

Upon the foregoing papers, defendant's motion to compel arbitration and plaintiff's cross-motion for an order denying defendant's motion and invalidating the Waiver Agreement between the parties, is decided as follows:

Plaintiff brings this action against defendant seeking damages for injuries she sustained when she participated in defendant's "Urban Mudder" event. Defendant contends that this dispute should be arbitrated pursuant to the contract between the parties. Typically, arbitration clauses in contracts are regularly enforced and encouraged as a matter of public policy (*159 MP Corp. v Redbridge Bedford, LLC*, 160 AD3d 176, 205 [2d Dept 2018]). Defendant provides a copy of the contract, which states that all disputes between the parties shall be submitted to binding arbitration with the American Arbitration Association.

Plaintiff argues the arbitration contract is invalid pursuant to GBL § 399-c, which prohibits mandatory arbitration in consumer contracts. Defendant contends that the Federal Arbitration Act preempts GBL § 399-c because defendant's business is involved in interstate commerce (*Marino v Salzman*, 51 Misc 3d 131[A], 2016 NY Slip Op 50410[U], *1 [App Term,

2d Dept 2016]; *Ayzenberg v Bronx House Emanuel Campus, Inc.* (93 AD3d 607, 608 [1st Dept 2012]). However, defendant provides no evidence from someone with personal knowledge of this factual claim (*cf Marino*, 51 Misc 3d 131[A], 2016 NY Slip Op 50410[U], *1 [holding that the FAA preempted GBL § 399-c in that case because an employee of defendant submitted an affidavit wherein he stated that defendant was a multi-state company with business in several states]). Accordingly, defendant has not established that the FAA applies and, as a result, whether the arbitration provision is enforceable here.

Plaintiff further argues that the contract cannot be admitted into evidence pursuant to CPLR 4544 because it involves a consumer transaction and the text of the contract is less than 8-point font. In support of this argument, plaintiff submits the affidavit of Vadim Shtulboym, a paralegal in plaintiff counsel's office. Mr. Shtulboym states that, based on his work experience, he has determined, with the aid of a scanner and Abobe Acrobat Reader DC, that the contract between the parties is 7-point font. Mr. Shtulboym explains that he came to this conclusion by typing words in 8-point font and 6-point font, and comparing them to the text of the contract, the size of which appeared to be in between the two fonts.

In opposition, defendant submits the affidavit of Johnny Little, the Director of Course and Construction with defendant, who states that the font used in the contract was 8-point, Times New Roman. Mr. Rosen further states that defendant forwarded a draft of the contract, in Microsoft Word format, to be professionally printed for the event, without any reduction in font size. Accordingly, there is a triable issue of fact as to whether the document is 8-point font.

Finally, plaintiff argues that the waiver of liability clause in her contract with defendant is void because violates GBL § 5-326, which prohibits contracts between the "owner or operator of

any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities" from exempting such 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". Plaintiff does not object to the substance of any other portion of the contract.

Defendant contends that the Urban Mudder event is not a place of amusement or recreation. While the statute does not define these terms, courts have applied them to a range of activities, such as rock climbing (*Lee v Brooklyn Boulders*, LLC, 156 AD3d 689, 690 [2d Dept 2017]), motocross (*Sisino v Is. Motocross of New York, Inc.*, 41 AD3d 462, 463 [2d Dept 2007]), automobile racing (*Knight v Holland*, 148 AD3d 1726, 1727 [4th Dept 2017]), sky diving (*Nutley v SkyDive the Ranch*, 65 AD3d 443, 444 [1st Dept 2009]), spa activities (*Debell v Wellbridge Club Mgt., Inc.*, 40 AD3d 248, 250 [1st Dept 2007]), and horseback riding (*Filson v Cold Riv. Trail Rides Inc.*, 242 AD2d 775, 776 [3d Dept 1997]).

Defendant's attempt to distinguish the Urban Mudder event from these activities is unavailing. As an initial matter, defendant counsel's description of the event holds no evidentiary value, as counsel does not establish his personal knowledge of these events. Secondly, even if this court were to accept counsel's description, the event's "rigorous" and "athletic" nature is no different than the other activities listed above. Furthermore, counsel's assertion that these other applicable activities did not require "physical preparation" is simply baseless. Accordingly, this court finds that the contract's waiver of negligence liability violates GBL § 5-236.

For the foregoing reasons, defendant's motion to compel arbitration is denied and plaintiff's cross-motion is granted to the extent that the contract's waiver of negligence liability is deemed void.

This constitutes the decision and order of the court.

September 21, 2018
DATE

DEVIN P. COHEN
Acting Justice, Supreme Court