Almeida-Kulla v Deep Hollow Ltd.
2019 NY Slip Op 33140(U)
October 18, 2019
Supreme Court, New York County
Docket Number: 154754/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 46

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LORI ALMEIDA-KULLA and MICHAEL KULLA, Index No. 154754/2016

Plaintiffs

- against - DECISION AND ORDER

DEEP HOLLOW LTD. d/b/a DEEP HOLLOW RANCH STABLE, "JANE DOE" (name being fictitious), an employee of DEEP HOLLOW LTD., DEEP HOLLOW RANCH CORP., and DEEP HOLLOW CORP.

Defendants

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APPEARANCES:

For Plaintiffs
Daniel Flanzig Esq.
Flanzig & Flanzig, LLP
323 Willis Avenue, Mineola, NY 11501

For Defendants
Joseph S. Fritzson Esq.
Sobel Pevzner, LLC
30 Vesey Street, New York, NY 10007

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff Almeida-Kulla sues for injuries she sustained April 30, 2016, after falling from a horse owned by defendant Deep Hollow Corp. as Almeida-Kulla was participating in its guided horseback ride. Plaintiff Kulla, her husband, claims derivatively for loss of Almeida-Kulla's services and society. Plaintiffs move to dismiss defendants' affirmative defenses

pertaining to Almeida-Kulla's assumption of risk and culpable conduct, C.P.L.R. § 3211(b); for summary judgment on defendants' liability, C.P.L.R. § 3212(b) and (e); and for a finding that Deep Hollow's agreement and release is unenforceable because it exempts Deep Hollow from liability for the negligence of Deep Hollow's employees. C.P.L.R. §§ 3001, 3212(b) and (e); N.Y. Gen. Oblig. Law § 5-326. Defendants separately move for summary judgment dismissing the amended complaint. C.P.L.R. § 3212(b). For the reasons explained below, the court grants plaintiffs' motion in part and denies defendants' motion.

II. UNDISPUTED FACTS

On April 30, 2016, plaintiffs' family, together with another family, visited Deep Hollow's ranch for a guided horseback ride of 90 minutes. Plaintiffs' riding group comprised four adults with their four young children led by a trail guide, Olga Goworek. Before departing on the ride, Almeida-Kulla signed Deep Hollow's Rental Agreement and Liability Release, which Deep Hollow concedes does not waive its liability for its employees' negligence.

Near the end of plaintiffs' ride and in sight of the stable, their riding group stalled and was holding up another riding group behind, because one of the children's horses in plaintiffs' group began grazing. The other group's trail guide, Francesca Keogh, dismounted her horse to attend to the grazing horse in

plaintiffs' group. Plaintiffs' group members all remained on their horses. During this wait, Keogh's horse suddenly ran off toward the stable. Aff. of Daniel Flanzig Ex. F, at 25, 39; Aff. of Joseph S. Fritzson Ex. J, at 25, 39. Plaintiffs' group of horses likewise started to run uncontrolled in the same direction. Because Almeida-Kulla was unable to control her horse, she fell from her horse and sustained fractures of her clavicle, scapula, and ribs as well as a long contusion and pneumothorax.

III. DISPUTED FACTS

The parties dispute three factual issues material to the parties' respective motions. First, the parties dispute whether Deep Hollow's trail guide Keogh, who was leading the group of riders behind plaintiffs' group, secured her horse adequately, if at all, after dismounting to assist one of the children in plaintiffs' group of stalled riders. Second, the parties dispute the sequence in which the horses ran back to the stable, specifically whether Keogh's horse first ran off, causing plaintiffs' group of horses to follow the guide horse, or plaintiffs' group of horses departed before or simultaneously with Keogh's horse. Third, the parties dispute whether Almeida-Kulla was holding her reins tightly when her horse began running back to the stable. Although the parties also dispute whether the two groups of riders merged and the significance of such a

merger and whether a cause external to the groups spooked or scared the horses, these factual questions do not materially bear on the parties' motions.

IV. STANDARDS FOR SUMMARY JUDGMENT AND FOR DISMISSAL OF DEFENSES

To obtain summary judgment, the moving parties must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). Only if the moving parties satisfy this standard does the burden shift to the opposing parties to rebut that prima facie showing by producing evidence, in admissible form, sufficient to require a trial of material factual issues. De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004).

In evaluating the evidence for purposes of the parties' motions, the court construes the evidence in the light most favorable to the opponents. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones,

26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d at 503. If the moving parties fail to meet their initial burden, the court must deny them summary judgment despite any insufficiency in the opposition. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005).

Plaintiffs also move to dismiss the first, second, fifth, tenth, eleventh, and twelfth affirmative defenses, which pertain to Almeida-Kulla's assumption of risk and culpable conduct, in defendants' answer to the amended complaint. C.P.L.R. § 3211(b). The court may dismiss affirmative defenses if they are without merit. C.P.L.R. § 3211(a)(7) and (b). Upon plaintiffs' motion to dismiss affirmative defenses, however, it is not defendants' burden to establish their defenses by admissible evidence, but plaintiffs' burden to establish that the defenses are legally inapplicable. Pugh v. New York City Hous. Auth., 159 A.D.3d 643, 643 (1st Dep't 2018); Granite State Ins. Co. v. Transatlantic Reins. Co., 132 A.D.3d 479, 481 (1st Dep't 2015); Calpo-Rivera v. Siroka, 144 A.D.3d 568, 568 (1st Dep't 2016); 534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick, 90 A.D.3d 541, 542 (1st Dep't 2011). To defeat plaintiffs' motion to dismiss affirmative

defenses, defendants only need allege the defenses' factual elements, whether in the answer to the amended complaint or by supplementing the answer with affidavits or other admissible evidence. Pugh v. New York City Hous. Auth., 159 A.D.3d at 643; Granite State Ins. Co. v. Transatlantic Reins. Co., 132 A.D.3d at 481; 534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick, 90 A.D.3d at 542.

V. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. DEFENDANTS ESTABLISH A *PRIMA FACIE* DEFENSE THAT ALMEIDA-KULLA ASSUMED THE RISKS INHERENT IN HORSEBACK RIDING.

Defendants rely on Almeida-Kulla's deposition testimony to set forth a prima facie showing that Almeida-Kulla assumed the risks inherent in horseback riding. Morgan v. State of New York, 90 N.Y.2d 471, 484 (1997); Valverde v. Great Expectations, LLC, 131 A.D.3d 425, 426 (1st Dep't 2015); Tadmor v. New York Jiu Jitsu Inc., 109 A.D.3d 440, 441 (1st Dep't 2013). She admitted that before departing on the horseback ride she signed Deep Hollow's Rental Agreement and Liability Release, which includes her initials at every paragraph and signature at the end and provides that she assumed the risks of participating in this activity. Tindall v. Ellenberg, 281 A.D.2d 225, 225 (1st Dep't 2001).

Defendants also point to Almeida-Kulla's use of a helmet and her insistence that her children also wear helmets, even though helmets were not required, as indicating her assumption of the

risks involved. New York General Business Law § 396-dd, however, mandated that Deep Hollow provide helmets to all minors and to all beginning riders, which is how Almeida-Kulla described herself to defendants and how they admitted they considered her. Defendants' deposition witness further admitted her awareness that helmets were required "by law" at least for minors. Fritzson Aff. Ex. J, at 15.

B. PLAINTIFFS REBUT DEFENDANTS' SHOWING THAT ALMEIDA-KULLA ASSUMED ALL THE RISKS INVOLVED.

Consistent with the standards outlined above, the court must deny defendants' motion for summary judgment based on assumption of the risk if the evidence raises factual questions whether defendants concealed or unreasonably heightened the risk of harm beyond the usual risks inherent in the sporting activity that plaintiffs undertook. Morgan v. State of New York, 90 N.Y.2d at 485; Madsen v. Catamount Ski Resort, 165 A.D.3d 475, 475 (1st Dep't 2018); Zelkowitz v. Country Group, Inc., 142 A.D.3d 424, 427 (1st Dep't 2016). By raising factual issues material to whether Almeida-Kulla assumed the risk of riding her horse under the circumstances plaintiffs describe, they rebut defendants' showing and defeat their motion for summary judgment.

Plaintiffs' claims do not rest solely on the horses having acted in an unexpected manner, which may cause the riders to be thrown and is a risk inherent in horseback riding. E.g., Blumenthal v. Bronx Equestrian Ctr., Inc., 137 A.D.3d 432, 432

(1st Dep't 2016); Stanislav v. Papp, 78 A.D.3d 556, 556-57 (1st Dep't 2010). Plaintiffs claim that the intervening negligence by Deep Hollow's trail guide in failing to secure her guide horse, which consequently ran off to the stable, prompting Almeida-Kulla's horse and the other nearby horses to follow the guide horse, caused Almeida-Kulla to fall from her horse.

While Almeida-Kulla may have assumed the risks inherent in riding horses, consistent with defendants' concession that her signed waiver did not waive Deep Hollow's liability for its employees' negligence, Almeida-Kulla did not assume the risk of the trail guide's intervening negligence. Deep Hollow's Rental Agreement and Liability Release also asks prospective riders whether they are beginner riders, which Almeida-Kulla designated, alerting defendants to the need to operate the tour consistent with her minimal riding skills and the likelihood that she did not appreciate any risks not articulated in the agreement and release. Morgan v. State of New York, 90 N.Y.2d at 486; Turcotte v. Fell, 68 N.Y.2d 432, 440 (1986); Maddox v. City of New York, 66 N.Y.2d 270, 278-79 (1985); Zelkowitz v. Country Group, Inc., 142 A.D.3d at 428. Plaintiffs' evidence demonstrates the employee's negligence that posed a risk not articulated in the agreement and release. Kulla testified at his deposition that:

> the group leader from the group behind us had gotten off her horse to move along the kid's horses [sic] that was grazing. She did not tie up her horse.

> Her horse got spooked, and it took off. Horses in that group behind us also started taking off, and the rest of-- our group's horses took off. . . . Even our group leader's horse took off, and what I mean by "taking off," is that they went into a full sprint.

Fritzon Aff. Ex. F, at 28.

Regarding the sequence in which the horses ran back to the stable and whether the trail guide's horse ran off first, causing the other horses to follow the guide horse, Kulla was "fairly certain that it was that group leader's horse" and further testified that "I remember that horse running by me, before the other horses." Id. at 39. Defendants suggest that only Keogh's horse ran by Kulla because all the other horses were in front of him. If they were in front, then the court, construing the evidence most favorably to plaintiffs, may infer that he was in a position to observe them when, from that vantage point, he observed that "that group leader's horse" ran off first and then confirmed that it ran "before the other horses." Id. Finally, the uneventful horseback tour up to that point, plus the over 1,000 previous uneventful horseback tours guided by defendants, further supports plaintiffs' claim that Almeida-Kulla's injury was caused by the negligence of Deep Hollow's employee and not the risks inherent in every guided horseback tour. Id. Ex. J, at 26-27, 48-49.

Because Almeida-Kulla considered herself a beginner rider, she specifically remembered "holding onto both the reigns [sic],

prior to falling off the horse . . . . I would say 100 percent," id. Ex. E, at 61, with both her feet in the stirrups. Therefore, despite Almeida-Kulla's beginner status, plaintiffs also rebut defendants' defense that her culpable conduct was the sole cause of her fall off her horse.

In sum, plaintiffs raise material factual issues undermining defendants' defense that Almeida-Kulla assumed the risk of her injury. As conceded by defendants, Almeida-Kulla did not assume the risk of the Deep Hollow trail guide's negligence demonstrated by Kulla's testimony. Custodi v. Town of Amherst, 20 N.Y.3d 83, 88 (2012); Morgan v. State of New York, 90 N.Y.2d at 485; Turcotte v. Fell, 68 N.Y.2d at 439. This evidence indicates that the negligence of Deep Hollow's employee increased the risk that horses suddenly would sprint back to the stable. Morgan v. State of New York, 90 N.Y.2d at 485; Madsen v. Catamount Ski Resort, 165 A.D.3d at 475; Zelkowitz v. Country Group, Inc., 142 A.D.3d at 427. Because plaintiffs raise material factual issues as to whether Almeida-Kulla assumed the risk of the particular circumstances that caused her to fall off her horse, plaintiffs' claims regarding defendants' negligence, fault, and consequent liability survive defendants' motion for summary judgment.

VI. PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' AFFIRMATIVE DEFENSES, FOR SUMMARY JUDGMENT, AND FOR A DECLARATORY JUDGMENT

A. PLAINTIFFS' MOTION TO DISMISS DEFENDANTS' AFFIRMATIVE DEFENSES PURSUANT TO C.P.L.R. § 3211(b)

Defendants' verified answer to the amended complaint pleads that Almeida-Kulla assumed the risks associated with horseback riding. While the answer contains no evidentiary facts, defendants now supplement their affirmative defenses with the deposition testimony by Deep Hollow's trail guide Keogh, who led the riding group behind plaintiffs' group. She testified that an unknown cause spooked all the horses, triggering them to run to the stable, which is a risk inherent in horseback riding that Almeida-Kulla assumed. Flanzig Aff. Ex. F, at 35. Keogh explained that this risk of a horse spooking, becoming scared or shying away, and suddenly running is inherent in riding, no matter how experienced the rider or trained the horse, because a horse is an animal with instinctive animal behaviors. Id. at 24-26. Through this testimony, defendants defeat plaintiffs' motion to dismiss the affirmative defense of assumption of risk. Morgan v. State of New York, 90 N.Y.2d at 484; Valverde v. Great Expectations, LLC, 131 A.D.3d at 426; Tadmor v. New York Jiu Jitsu Inc., 109 A.D.3d at 441. See Pugh v. New York City Hous. Auth., 159 A.D.3d at 643; Granite State Ins. Co. v. Transatlantic Reins. Co., 132 A.D.3d at 481; 534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick, 90 A.D.3d at 542.

Defendants' verified answer to the amended complaint also pleads that Almeida-Kulla's culpable conduct was the sole or at least a contributing cause of her injury. Like the affirmative defense of assumption of risk, defendants' bald allegations require supplementation, supplied by Keogh's testimony and affidavit. Keogh observed that Almeida-Kulla both failed to hold her reins tightly to control her horse and failed to pull the reins back after the horses were spooked and began running to the stable, contrary to the preliminary instructions to all riders and Keogh's instructions to Almeida-Kulla when the horses began to run. Flanzig Aff. Ex. F, at 38-39; Aff. in Opp'n of Joseph S. Fritzon Ex. F ¶¶ 15-17. Keogh's testimony and affidavit that Almeida-Kulla's negligent failure to hold and pull her reins to restrain her horse contributed to her fall from her horse also withstand plaintiffs' motion to dismiss defendants' affirmative defense that Almeida-Kulla's negligent conduct caused or contributed to her fall and consequent injury. Godfrey v. G.E. Capital Auto Lease, Inc., 89 A.D.3d 471, 479 (1st Dep't 2011); Williams v. Hooper, 82 A.D.3d 448, 454 (1st Dep't 2011); Pinto v. Selinger Ice Cream Corp., 47 A.D.3d 296, 297 (1st Dep't 2007); Abrams v. Port Auth. Trans-Hudson Corp., 39 A.D.3d 350, 350 (1st Dep't 2007). See Pugh v. New York City Hous. Auth., 159 A.D.3d at 643; Granite State Ins. Co. v. Transatlantic Reins. Co., 132 A.D.3d at 481; 534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick,

90 A.D.3d at 542. Whether her conduct was the sole or only a contributing cause depends on whether the negligence of Deep Hollow's employee caused Almeida-Kulla's horse to sprint away suddenly, discussed above and discussed further below. Hain v. Jamison, 28 N.Y.3d 524, 529 (2016); Mazella v. Beals, 27 N.Y.3d 694, 706 (2016). Based on defendants' evidence, however, the court denies plaintiffs' motion to dismiss defendants' affirmative defenses.

B. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON LIABILITY PURSUANT TO C.P.L.R. § 3212(b)

Plaintiffs fail to eliminate the material factual issue whether Keogh's horse first started running and prompted Almeida-Kulla's horse to follow, or the horses in plaintiffs' group spooked and started running to the stable before or simultaneously with Keogh's horse. Flanzig Aff. Ex. F, at 35. This outstanding temporal issue, whether Keogh's horse prompted Almeida-Kulla's horse to run or the horses in plaintiffs' group started running independently of, even if simultaneously with, Keogh's horse, precludes summary judgment on defendants' liability. See, e.g., Radelijic v. Certified of N.Y., Inc., 161 A.D.3d 588, 590 (1st Dep't 2018); Greenidge v. HRH Constr. Corp., 279 A.D.2d 400, 401-402 (1st Dep't 2001).

1. Keogh's Negligence

Regarding Keogh's intervening negligence, in addition to Kulla's testimony quoted above, Flanzig Aff. Ex. E, at 28,

plaintiffs rely on Keogh's own testimony, admitting her failure to secure her horse adequately. Id. Ex. F at 35-36. Tellingly, neither her testimony nor her affidavit explains how, if her horse ran off to the stable shortly after Keogh had tied the horse's reins to a fence post that remained intact, she adequately secured the horse. In fact, to explain why she tied up her horse, she testified: "So it wouldn't run away, run back to the barn, because we were ten minutes away," alluding to the fact that the barn was in sight. Id. at 34. She used a slipknot so that, if her horse pulled on the reins, the knot was "supposed to tighten." Id. at 53.

Keogh thus admitted that any attempt she made to tie up her horse failed to accomplish the very purpose for tying up the horse. Since she tied the reins to the top of the vertical post, rather than under either of the horizontal posts intersecting it, when her horse pulled on the reins, they likely slipped off the top, rather than tightening around the vertical post as she had intended. Id.

Plaintiffs' expert equestrian Randi Thompson accentuates this point, concluding that: "If the 'Slip Knot' had been properly tied, the horse would not have gotten loose. The horse was obviously not secured properly. . . . Once free, the horse that Ms. Keough [sic] did not secure properly . . ., as it's the natural tendency of horses, headed home quickly." Id. Ex. H ¶¶

4-5. While defendants complain that the evidence does not support other opinions by Thompson, it fully supports her key opinions on which plaintiffs and the court rely: that Keogh's slip knot allowed her horse to free itself and that it headed to the stable according to horses' natural tendency.

Consequently, unless the horse running away posed no risk of harm and only an inconvenience to the rider of walking and retrieving the horse, Keogh was negligent in failing to secure her horse adequately. The very circumstances of Almeida-Kulla's injury demonstrate that, among a group of beginning riders, including children, a horse running away did pose a danger to the other riders, even if in these circumstances the horse that ran away and triggered Almeida-Kulla's horse to follow was not Keogh's horse. Hain v. Jamison, 28 N.Y.3d at 533; Sanchez v. State of New York, 99 N.Y.2d 247, 252 (2002); Kriz v. Schum, 75 N.Y.2d 25, 34 (1989); Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 316 (1980). See DiPonzio v. Riordan, 89 N.Y.2d 578, 584 (1997).

Finally, plaintiffs emphasize that a trail guide allowing her horse to run loose is not among the usual risks inherent in defendants' guided horseback tours. Morgan v. State of New York, 90 N.Y.2d at 488-89; Madsen v. Catamount Ski Resort, 165 A.D.3d at 475; Zelkowitz v. Country Group, Inc., 142 A.D.3d at 428. After all, a similar event has not occurred in over 1,000

previous rides nor in the preceding 13 years of Keogh's employment. Flanzig Aff. Ex. F, at 26-27, 48-49.

Defendants present no evidence to undermine plaintiffs' prima facie showing of Keogh's negligence. Defendants simply rest on their affirmative defenses, Almeida-Kulla's assumption of the risk and culpable conduct, and insist that plaintiffs failed to establish defendants' negligence, instead of rebutting the evidence that Keogh's negligence provided the opportunity for her horse to run toward the stable, causing other horses to follow and leading to Almeida-Kulla's injury. E.g., Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d at 454; Legakis v. New York Westchester Sq. Med. Ctr., 144 A.D.3d 549, 549-50 (1st Dep't 2016); Sarac-Marshall v. Mikalopas, 125 A.D.3d 570, 570-71 (1st Dep't 2015); Capuano v. Tishman Constr. Corp., 98 A.D.3d 848, 851-52 (1st Dep't 2012).

Defendants continue to rely on the agreement and release to absolve themselves of any liability for Almeida-Kulla's injury. As explored above, Almeida-Kulla did not assume the risk of Keogh's intervening negligence, demonstrated by Kulla's testimony, Keough's own testimony, and the affidavit of plaintiffs' expert. Morgan v. State of New York, 90 N.Y.2d at 488-89; Madsen v. Catamount Ski Resort, 165 A.D.3d at 475; Zelkowitz v. Country Group, Inc., 142 A.D.3d at 428. See Custodi v. Town of Amherst, 20 N.Y.3d at 88; Turcotte v. Fell, 68 N.Y.2d

at 439. Defendants bore the duty to make the horseback ride as safe as it appeared. Custodi v. Town of Amherst, 20 N.Y.3d at 88; Morgan v. State of New York, 90 N.Y.2d at 484; Turcotte v. Fell, 68 N.Y.2d at 439. Nothing in the agreement and release or any other evidence alerted plaintiffs to the risk created by Keogh's inadequately secured horse. Therefore defendants' use of the agreement and release also fails to rebut plaintiffs' evidence that Keogh's negligence caused Almeida-Kulla's injury.

Nor does the affidavit by defendants' expert Bridget Brandon explain how Keogh adequately secured her horse. Although Brandon concludes that Keogh acted reasonably according to accepted equestrian standards, Brandon ignores Keogh's own testimony and instead speculates as to the unlikelihood of Almeida-Kulla's injury had Keogh not tied up her horse at all. Fritzon Aff. in Opp'n Ex. B to Ex. G, at 3, 12. See Reif v. Nagy, 175 A.D.3d 107, 125-26 (1st Dep't 2019); Pastora L. v. Diallo, 167 A.D.3d 424, 425 (1st Dep't 2018); Montilla v. St. Luke's-Roosevelt Hosp., 147 A.D.3d 404, 407 (1st Dep't 2017); Santoni v. Bertelsmann Prop., Inc., 21 A.D.3d 712, 714-15 (1st Dep't 2005). In response to plaintiffs' evidence that Keogh failed to secure her horse adequately, Brandon counters that tying a horse to a fence with a loose slip knot is acceptable because, "if the horse is panicked, you want to be sure the knot will not bind itself if pulled tight . . . . You want that horse to be able to fairly

easily become free or break away . . . ." Fritzon Aff. in Opp'n Ex. B to Ex. G, at 4. See id. at 10-11. Brandon is concerned that, if a horse is tied so that it is unable to move about, becomes panicked, and is unable to take flight, it may fight to free itself, thrash, kick, rear, strike out, break the fence, and run off dragging the fence, creating greater danger than if it ran off alone. Id. at 4-5.

First, no evidence indicates that Keogh's horse was so constrained that it could not walk back and forth or that it panicked at any point. More importantly, Brandon's suggestion as to how a rider might want to tie up her horse disregards Keogh's testimony that Keogh tied her slip knot so that it would tighten if her horse pulled on the reins. See Reif v. Nagy, 175 A.D.3d at 126-27; Halloran v. Kiri, 173 A.D.3d 509, 510-11 (1st Dep't 2019); Santoni v. Bertelsmann Prop., Inc., 21 A.D.3d at 714-15; Cillo v. Resjefal Corp., 16 A.D.3d 339, 341 (1st Dep't 2005). She never testified that she intended to tie her knot loosely so that if her horse pulled on the knot the horse could become free or break away. She was asked: "Did your horse break free from the tie . . . ?" Fritzon Aff. in Opp'n Ex. D, at 36. She answered: "Unfortunately," id., not, as Brandon suggests, "fortunately; otherwise the horse would have fought to free itself, thrashed, kicked, reared, struck out, broken the fence, and dragged it wildly behind."

Instead of drawing conclusions about Keogh's conduct based on Keogh's account, Brandon repeatedly attempts to lay blame on plaintiffs' young daughter, who allowed her horse to graze. Brandon scolds the child for not following instructions to hold onto her reins, requiring Keogh to dismount her horse to retrieve the child's reins. Id. at 7-8. "In doing so, Ms. Keough [sic] and Deep Hollow did nothing to heighten and/or increase the risk involved in horseback riding and acted without any negligence." Id. at 8. See id. at 10, 12.

Plaintiffs do not claim that Keogh was negligent in dismounting to help the child or increased any risk by doing so. If after Keogh did so she had tied her horse securely, however, it would not have run to the stable, which are the acts that plaintiffs claim were negligent and led to Almeida-Kulla's injury.

2. Whether Keogh's Negligence Caused Almeida-Kulla's Injury

Regarding whether Keogh's horse caused the other horses to follow it, plaintiffs' expert equestrian Thompson concludes that, because the horse was inadequately secured, it ran toward the stable, causing the nearby horses, including Almeida-Kulla's horse, to run due to natural herd tendencies and proximity to the stable. Flanzig Aff. Ex. H ¶ 5. This opinion, along with Kulla's testimony, establishes not only Keogh's negligence but also that her negligence caused Almeida-Kulla's horse to run

suddenly and unexpectedly, leading to her fall from her horse. See Morgan v. State of New York, 90 N.Y.2d at 488-89; Madsen v. Catamount Ski Resort, 165 A.D.3d at 475; Zelkowitz v. Country Group, Inc., 142 A.D.3d at 428.

Defendants' expert equestrian corroborates Thompson's conclusion that the horses' natural behavior pattern was to react similarly to one another as a herd. Fritzon Aff. in Opp'n Ex. B to Ex. G, at 4, 11. See Reif v. Nagy, 175 A.D.3d at 126. Keogh admitted that she did not identify anything that might have spooked any of the horses, supporting Thompson's conclusion that plaintiffs' group of horses ran only because they were following Keogh's horse, which was free to run to the stable without the restraint of either a rider or a secure tie. Flanzig Aff. Ex. F, at 44. Again, even if the evidence does not support other opinions by Thompson, it fully supports the key opinion on which plaintiffs and the court rely: that Keogh's horse ran toward the stable and, when it did so, it caused the nearby horses, including Almeida-Kulla's horse, to run due to natural herd tendencies and proximity to the stable. In fact defendants' expert Brandon also corroborates Thompson's conclusion and Keogh's inability to identify any spooking, when Brandon herself concludes that "the horses were reactive and not spooked." Fritzon Aff. in Opp'n Ex. B to Ex. G, at 5. See Reif v. Nagy, 175 A.D.3d at 126.

Defendants rely on Keogh's testimony earlier in her deposition that, while admitting she inadequately secured her horse to the fence, all the horses spooked simultaneously and ran away or toward the stable. Fritzon Aff. in Opp'n Ex. D, at 35. This testimony, however, does not contradict Kulla's observation that Keogh's horse was the first to run and Thompson's explanation how that horse set off a chain reaction of horses that followed.

When Keogh described all the horses spooking and running concurrently, she was referring to the horses other than her horse. She was asked: "Where was your horse at that point?" Id. She answered that it already "had run back to the barn." Id. When asked whether her horse broke free before, at the same time, or after "all the horses ran," she answered only that "I would imagine at the same time, but I didn't see it." Id. at 36 (emphases added). Although asked, Keogh failed to identify either "anything that could have spooked the horses" or "which horse began to run first," because again she "wasn't looking." Id. at 44.

While potentially in conflict with this prior testimony, Keogh later described her observation as she was walking back to her horse after assisting with the horse that was grazing. Her account that she was walking toward her horse indicates it was still where she had tied it. Before she reached her horse,

"something spooked the horses on Olga's ride and they took off." Id. at 56. Even if this testimony conflicts with other testimony, even from Keogh herself, for purposes of plaintiffs' motion for summary judgment, the court must rely on the account most favorable to defendants. See Savall v. New York City Tr. Auth., 173 A.D.3d 566, 566 (1st Dep't 2019); Guerrero v. 115 Cent. Park W. Corp., 168 A.D.3d 408, 408 (1st Dep't 2019); Santos v. Condo 124 LLC, 161 A.D.3d 650, 655 (1st Dep't 2018); Mosley v. General Chauncey M. Hooper Towers Hous. Dev. Fund Co., Inc., 48 A.D.3d 379, 380 (1st Dep't 2008).

This testimony preserves the factual question whether Keogh's horse ran first, prompting other horses to follow, or plaintiffs' group of horses spooked and ran toward the stable independently of the actions by Keogh's horse. By offering this contradictory sequence of events, defendants defeat plaintiffs' motion for summary judgment on defendants' liability.

Moreover, Kulla describes Keogh's horse as having been spooked. That observation is of less consequence than evidence that the other horses were spooked, since Keogh's horse, whether spooked or not, ran to the stable because the horse was inadequately restrained, but the spooking of Keogh's horse raises the inference that the same cause may have spooked all the horses in concert, given Keogh's testimony that: "Normally when one horse spooks, the majority spook . . . ." Fritzon Aff. in Opp'n

Ex. D, at 40.

Consequently, while plaintiffs have established the negligence of Deep Hollow's employee, the outstanding issue whether her negligence caused Almeida-Kulla's horse to sprint away suddenly precludes summary judgment on defendants' liability. See Rodriguez v. Budget Rent-A-Car Sys., Inc., 44 A.D.3d 216, 222 (1st Dep't 2007); Ohdan v. City of New York, 268 A.D.2d 86, 89 (1st Dep't 2000). Plaintiffs have failed to eliminate the material factual issue whether the Deep Hollow trail guide's failure to secure her horse adequately, so that it ran to the stable, caused Almeida-Kulla's horse to run in the same direction. See, e.g., Radelijic v. Certified of N.Y., Inc., 161 A.D.3d at 590; Greenidge v. HRH Constr. Corp., 279 A.D.2d at 401-402. Only when the issue whether defendants' negligence caused Almeida-Kulla's injury is resolved, which the current record fails to accomplish, may the court determine defendants' liability. C.P.L.R. § 3212(b) and (e). Therefore the court grants plaintiffs' motion for summary judgment to the extent of determining that defendants were negligent when Deep Hollow's trail guide failed to secure her horse adequately, but the court denies plaintiffs' motion for partial summary judgment on defendants' liability. C.P.L.R. § 3212(b) and (e). See Rodriguez v. City of New York, 31 N.Y.3d 312, 324 (2018).

C. PLAINTIFFS' REQUEST FOR A DECLARATORY JUDGMENT THAT DEEP HOLLOW'S RELEASE IS UNENFORCEABLE

Plaintiffs also seek a declaratory judgment on whether Deep Hollow's agreement and release is unenforceable because it exempts Deep Hollow from liability for damages caused by the negligence of Deep Hollow's employees. C.P.L.R. § 3001; N.Y. Gen. Oblig. Law § 5-326. A declaratory judgment requires an actual ongoing controversy between interested parties that needs resolution by the court. C.P.L.R. § 3001; Board of Mgrs. of Honto 88 Condominium v. Red Apple Child Dev. Ctr., a Chinese Sch., 160 A.D.3d 580, 581 (1st Dep't 2018); Touro Coll. v. Novus Univ. Corp., 146 A.D.3d 679, 679-80 (2017); Megibow v. Condominium Bd. of Kips Bay Towers Condominium, 38 A.D.3d 265, 266 (1st Dep't 2007); Long Is. Light. Co. v. Allianz Underwriters Ins. Co., 35 A.D.3d 253, 253 (1st Dep't 2006). Although defendants rely on their agreement and release to escape liability, they agree with plaintiffs that the agreement and release does not remove liability in the event of intervening negligence by Deep Hollow's employee. BLT Steak, LLC v. 57th St. Dorchester, Inc., 93 A.D.3d 554, 554 (1st Dep't 2012).

The court also must hesitate to find a contractual provision, let alone the entire contract, unenforceable due to the strong public interest in the freedom of contract. 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353, 360 (2019). Defendants' agreement and release involves neither illegal

activity nor any of the limited circumstances that permit a finding of an unenforceable agreement. For these combined reasons, the court denies plaintiffs' motion for a declaratory judgment. C.P.L.R. § 3001; 159 MP Corp. v. Redbridge Bedford, LLC, 33 N.Y.3d 353 at 360.

VII. CONCLUSION

For all the reasons explained above, the court denies both defendants' motion for summary judgment, C.P.L..R. § 3212(b), and plaintiffs' motion to dismiss defendants' affirmative defenses pertaining to Almeida-Kulla's assumption of risk and culpable conduct, C.P.L.R. § 3211(b); for summary judgment on defendants' liability, C.P.L.R. § 3212(b) and (e); and for a finding that defendants' agreement and release is unenforceable. C.P.L.R. §§ 3001, 3212(b) and (e); N.Y. Gen. Oblig. Law § 5-326. The court grants plaintiffs' motion for summary judgment to the extent of determining that defendants were negligent. C.P.L.R. § 3212(b) and (e).

Thus the issues for trial will be whether the negligence of Deep Hollow's employee in failing to secure her horse caused Almeida-Kulla's horse to sprint away and contributed to her injury and, if so, whether Almeida-Kulla's own conduct also contributed to her injury. See Rodriguez v. City of New York, 31 N.Y.3d at 323-24. If the employee's negligence did contribute to Almeida-Kulla's injury, defendants' affirmative defense of

assumption of risk is academic. If the employee's negligence was not a contributing cause, that defense remains viable. This decision constitutes the court's order.

DATED: October 18, 2019

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.