SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

KRISTA SCHUTT INDEX NO. 158734/19

MOT. DATE

- v -

FUELSOUL GROUP, LLC et al. MOT. SEQ. NO. 2&3

The following papers were read on this motion to/for amend and x-mot to dismiss (2) and dismiss/sj (3)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

There are two motions pending before the court, which are informed by the court's prior decision/order dated April 27, 2020, wherein the court dismissed plaintiff's claims against defendant Jordan Santo and directed him to answer the crossclaims asserted by codefendant Fuelsoul Group, LLC d/b/a Orangetheory ("Fuelsoul"). Plaintiff now moves to amend her complaint in motion sequence 2. Plaintiff's counsel explains that the purpose of this motion "is to provide additional details and allegations in the Complaint as to defendant ORANGETHEORY". Fuelsoul opposes the motion and cross-moves to dismiss. Plaintiff opposes the cross-motion. Meanwhile, in motion sequence 3, Santo moves to dismiss the crossclaims and Fuelsoul opposes that motion as well. Both motions are consolidated for the court's consideration and disposition in this single decision/order.

The court will first consider the motion to amend. In the 4/27/20 decision, the court stated: "while the court cannot dismiss as to defendant Fuelsoul, there are absolutely no facts alleged in the complaint that Fuelsoul was negligent, either. The only allegations as to Fuelsoul is that it is a corporation, that it has an office for doing business… and that plaintiff had a valid membership with Fuelsoul." Plaintiff's counsel now asserts that the proposed complaint alleges that Fuelsoul had a duty to participants in the exercise class, including plaintiff, that Fuelsoul's employees supervised, directed and instructed the class and did not properly perform those duties when the weight/dumbbell fell onto plaintiff.

In opposition to plaintiff's motion, Fuelsoul argues that it should be denied because the proposed amended complaint is not verified, and requests that if the court grant the motion, Fuelsoul's crossclaims against Santos should be converted to a third-party complaint and plaintiff should be directed to serve the amended complaint as per the CPLR.

Leave to amend a pleading should be freely given in the absence of prejudice or surprise to the non-moving party (*Fahey v. Ontario County*, 44 NY2d 934 [1978]; see also *Seda v. New York City Housing Authority*, 181 AD2d 469 [1st Dept 1992]). The opponent of a motion to amend bears the burden of demonstrating prejudice (*Seda*, *supra* at 470). A motion to amend should be denied where it is

Dated: December 18, 2020

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

"clear and free from doubt" that the proposed claim lacks merit (*Hawkins v. Genesee Place Corp.*, 139 AD2d 433 [1st Dept 1988]).

While Fuelsoul urges that plaintiff's claims against it should be dismissed based upon the court's 4/27/20 decision, the court disagrees. Plaintiff's motion to amend has addressed the deficiencies identified by the court in the prior decision/order. Since there is no argument that plaintiff's proposed claims lack merit, plaintiff's motion to amend is granted and Fuelsoul's cross-motion to dismiss is denied. The court now turns to Santo's motion.

Santo moves both to dismiss pursuant to CPLR § 3211[a][1] and [7] as well as pursuant to CPLR § 3212. Issue has been joined as to Fuelsoul's crossclaim. Therefore, summary judgment relief is available. Fuelsoul has asserted three crossclaims against Santo: [1] insurance, contractual and common law indemnification; [2] contribution; and [3] breach of contract for failure to procure insurance.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88).

Certainly, Fuelsoul cannot point to any contract between it and Santo which required the latter to procure insurance. Therefore, the third crossclaim is severed and dismissed. The court will consider the balance of the motion under CPLR § 3212's more exacting standard.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Santo argues that there cannot be any liability for contribution based on the court's 4/27/20 decision and that the agreement between the parties does not give rise to a duty to indemnify Fuelsoul for injuries sustained by nonparties to said agreement. Meanwhile, Fuelsoul maintains that the court's 4/27/20 decision does not bar its crossclaims against Santo because the court's decision was not on the merits, that Santo's affidavit is insufficient to meet his burden on the motion and/or triable issues of fact preclude summary judgment as to whether Santo breached a duty owed to plaintiff and/or was negligent. Fuelsoul asserts that there are issues of fact as to the applicability of the indemnification provision and otherwise argues that Santo's motion is premature. Video of the underlying incident has been provided to the court.

At the outset, it is of no moment that discovery has not been exchanged since a motion for summary judgment is only premature when the opponent of the motion can point to specific documents or testimony not presently in its possession which would enable it to defeat the motion (CPLR § 3212[f]).

Fuelsoul's mere speculation that evidence might exist showing that Santo was negligent is insufficient to defeat the motion.

However, Fuelsoul's crossclaim for contractual indemnification must be dismissed as a matter of law. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.,* 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.,* 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

The indemnity provision between Fuelsoul and Santos is embedded in a client intake form and provides in relevant part as follows:

> Client has been informed that any fitness program includes possible risks and all exercises and use of the Studio's or Facility's equipment, furniture, and/or amenities, shall be undertaken at Client's sole risk and discretion. Client assumes full responsibility for any and all damages, injuries or losses, including without limitation, those damages from acts of passive or active negligence on the part of the studio, the Facility, the Studio instructors, officers, directors, employees, or agents (collectively, "Studio Parties"). Client hereby waives all claims against the Studio Parties and/or any successor assigns and all claims, demands, injuries, damages, actions, or causes of action, whatsoever to my person or property arising out of or connected to the services, facilities, exercise classes, or the facility where same is located (including the studio and/or the Facility, as applicable). Client hereby agrees to forever indemnify defend, hold harmless, release and discharge the Studio and Facility from all claims, demands, injuries, damage actions, causes of action and from all acts of active or passive negligence on the part of the Studio Parties and/or any successors and assigns, whatsoever, **for any damages, injuries or losses that may be sustained by the Client** arising from or in connection with the activities or use of the Studio's or Facility's equipment, furniture, and/or amenities that Client voluntarily participates, including without limitation, attorney's fees, costs, and expenses of any litigation, arbitration or other proceeding. Client acknowledges that he/she has carefully read this paragraph and fully understands that this is a waiver and release of liability.
>
> (Emphasis added.)

Since plaintiff's claims against Fuelsoul do not fall within the category of claims which Santo agreed to defend and hold Fuelsoul harmless for, specifically claims for any damages sustained by Santo, Santo is entitled to summary judgment dismissing Fuelsoul's crossclaim for contractual indemnification.

The court, however, agrees with Fuelsoul that the 4/27/20 was not a decision on the merits, and further, that Santo has not established *prima facie* entitlement to summary judgment dismissing its crossclaims for contribution and common law indemnification. "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (Godoy v Abamaster of Miami, 302 AD2d 57, 61 [2d Dept 2003], lv dismissed 100 NY2d 614 [2003] [internal quotation marks and citations omitted]).

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'"

(*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]).

While the court dismissed plaintiff's claim against Santo because plaintiff failed to allege sufficient facts to demonstrate a *prima facie* cause of action against him, on this record, if Fuelsoul is held liable for plaintiff's injuries, it may be entitled to contribution and/or common law indemnification if a factfinder concludes that Santo contributed to plaintiff's accident. Where here, Santo swung a dumbbell which slipped out of his hand and fell onto plaintiff, causing her injuries, a reasonable factfinder could find that he contributed to plaintiff's accident and therefore apportion liability between Fuelsoul and Santo. Further, Santo has not shown that Fuelsoul was negligent as a matter of law, thereby precluding a finding that Fuelsoul is entitled to common law indemnification. Accordingly, Santo's motion as to these cross-claims is denied.

The court denies the balance of Fuelsoul's cross-motion, which was to convert its crossclaims into a third-party action and direct plaintiff to serve the proposed complaint pursuant to the CPLR. Conversion is unnecessary and will just unnecessarily complicate this case. As for service, the court deems the proposed complaint served and filed in the form annexed to plaintiff's motion papers as NYSCEF Doc No. 25 and directs Fuelsoul to answer the complaint within 30 days from service of this order with notice of entry.

Conclusion

Accordingly, it is hereby **ORDERED** that motion sequence number 2 is decided as follows:

Plaintiff's motion to amend the complaint is granted to the extent that the proposed complaint annexed as NYSCEF Doc No. 25 is deemed served and filed and Fuelsoul is directed to answer the complaint within 30 days from service of this order with notice of entry; and

Fuelsoul's cross-motion is denied; and it is further

ORDERED that Santo's motion to dismiss and/or for summary judgment (motion sequence 3) is granted to the extent that Fuelsoul's crossclaims for contractual/insurance indemnification and for breach of contract for failure to procure insurance are severed and dismissed; and it is further

ORDERED that Santo's motion is otherwise denied; and it is further

ORDERED that the parties shall meet and confer on or before February 26, 2021 and complete a preliminary conference order. Proposed preliminary conference orders should be filed on NSYCEF. Preliminary conference order forms are available on the nycourts.gov website at:

https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/PC-Genl.pdf.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: December 18, 2020
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.