SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

CHRISTINE SHAW

INDEX NO. 160167-2018

MOT. DATE

- v -

MOT. SEQ. NO. 2&3

AKT INMOTION INC. et al

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS Doc. No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS Doc. No(s)._____
Replying Affidavits ECFS Doc. No(s)._____

In this action, plaintiff seeks to recover for personal injuries she allegedly sustained when a resistance band she was using at defendants' premises during an exercise class "slingshotted' into her right eye. There are two motions presently pending. The first is by defendants seeking an order staying enforcement of plaintiff's discovery demands, including her notice to admit dated January 7, 2021, sanctions for frivolous conduct and a protective order. The second motion is also by defendants and seeks summary judgment dismissing plaintiff's complaint. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

Since disposition of the summary judgment motion may impact the discovery-related motion, the court will consider the former first. 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]). 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]).

In this action, plaintiff claims that she was injured during her first class at defendants' facility when she was instructed to loop a resistance band over a pipe installed along the ceiling. According to the complaint, defendants' instructions caused "tremendous tension" in the bands and due to that tension,

Dated: 5/18/21

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**

plaintiff's hand slipped out of the handle which "ricocheted over the ceiling pipe and struck plaintiff in the face, causing her to sustain the serious injuries". In support of their motion, defendants argue that plaintiff's claims are barred by a wavier form, that she assumed the risk of the injuries she sustained and alternatively that plaintiff cannot demonstrate a *prima facie* claim for negligence, breach of the implied warranty of merchantability and strict products liability.

There is no dispute that plaintiff signed a liability waiver form entitled "RELEASE OF LIABILTIY AND ASSUMPTION OF RISKS". At her deposition, plaintiff testified that she did not read the form because she did not have her glasses on. The waiver provides in pertinent part as follows:

> RELEASE OF LIABILITY AND ASSUMPTION OF RISKS
> THIS RELEASE IS A BINDING LEGAL CONTRACT.
> PLEASE READ IT CAREFULLY BEFORE SIGNING.
>
> I acknowledge that I have been advised about the program that I am going to participate in with my AKT
>
> …
>
> On behalf of myself and any person participating under my supervision, I expressly and voluntarily waive and release AKT INMOTION and its trainers from any and all liability for any claims, demands, or actions of any kind, including, but not limited to, personal injury or property damage that may occur in the course of any Service, or arising out of the use of the premises provided. I further agree to defend, indemnify and hold harmless AKT INMOTION and its trainers from any and all claims, actions or demands by any other party or individual which may arise out of any Service provided.
>
> …
>
> I acknowledge that I have read and understand the contents of this waiver and release.

Contracts which exculpate a party from liability, even arising from said parties' negligence, are enforceable (*see Gross v. Sweet*, 49 NY2d 102 [1979]). However, "unless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts" (*Id* at 107). While such waivers are subject to strict judicial scrutiny, they "will not be treated lightly and will be set aside by a court only for duress, illegality, fraud, or mutual mistake" (*L & K Holding Corp. v. Tropical Aquarium at Hicksville, Inc*., 192 AD2d 643, 645 [2d Dept 1992]).

Further, GOL § 5-326 prohibits the enforcement of exculpatory agreements by "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". Defendants argue that their establishment is instructional rather than recreational and therefore GOL § 5-326 does not apply. Plaintiff's counsel disagrees.

At the outset, the court agrees with defendants that the waiver unequivocally releases them from liability for plaintiff's alleged accident. In turn, plaintiff has failed to demonstrate any basis to set aside the waiver. Plaintiff's failure to read the waiver before she signed it does not warrant a different result, as parties are charged with reading a document that they signed (*Anderson v. Dinkes & Schwitzer, P.C.*, 150 AD3d 805 [2d Dept 2017]). Further, plaintiff is a sophisticated businesswoman, and she otherwise admitted that she printed her name, email address, phone number and emergency contact information in spaces that called for the input of such information which was in the same font and size as

the one page document plaintiff claims she could not read. No reasonable factfinder could find in plaintiff's favor and set aside the waiver on this record.

As for Section 5-236, the court rejects plaintiff's argument that the waiver plaintiff signed is similar to the one that was invalidated by the Court of Appeals in *Gross*, *supra*. Indeed, the waiver in *Gross* released the operator "for any personal injuries … that I may sustain or which may arise out of my learning, practicing or act of jumping from an aircraft" whereas the agreement here released the defendants from "any and all liability for any claims, demands, or actions of any kind, including, but not limited to, personal injury or property damage that may occur in the course of any Service, or arising out of the use of the premises provided." The wavier at issue here further provides that plaintiff agreed to indemnify defendants and their trainers "from any and all claims, actions or demands by any other party or individual which may arise out of any Service provided." Indeed, contrary to the waiver in *Gross*, the waiver here expressly releases defendants from liability for any claims, demands or actions of any kind. While the word "negligence" was not used in the waiver signed by plaintiff, the parties' intent to release defendants from liability for all claims, which necessary includes an ordinary negligence claim, cannot be ignored by the court. Thus, the waiver expressly applies to plaintiff's negligence claims in this action.

Plaintiff further contends that the class she was participating in was recreational rather than instructional and maintains that the defendants did not meet their burden on this point. Alternatively, plaintiff argues that triable issues of fact on this point preclude summary judgment. As the Third Department explained in *Lemoine v. Cornell University* (2 AD3d 1017, 1019 [2003]):

> The legislative intent [Section 5-236] 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. Facilities that are places of instruction and training, rather than "amusement or recreation", have been found to be outside the scope of the statute.
>
> (Internal citations omitted.)

To determine whether defendants' facility is instructional rather than recreational, courts consider "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* at 1019). With mixed-use facilities that offer both instruction and serve recreational functions, the plaintiff's purpose for being at the facility is generally more important than the facility's stated purpose. (*Id; see also Bacciocchi v. Ranch Parachute Club, Ltd.*, 273 AD2d 173 [1st Dept 2000]).

Defendants' founder, Anna Kaiser, testified at her deposition that AKT stands for "Anna Keiser Techniques". Kaiser further explained:

> Q. Can you describe what AKT is?
> A. AKT is a boutique fitness concept using dance and science. It is the combination of five different workouts that change. The content changes every three weeks.
> Q. What are the workouts?
> A. Tone, bands, circuit, dance and mixer.
> Q. Are those basically the names of different classes offered by AKT?
> A. Five different class formats.

Similar to *Lemoine*, plaintiff was at defendants' facility for the purposes of attending a class which offered instruction. However, on this record, defendants have failed to establish that their facility was instructional rather than recreational. Missing from defendants' motion is any proof regarding defendants' incorporation, statement of purpose or argument regarding plaintiff's primary purpose for being at their facility and the fee she was charged. Whereas in Lemoine, the defendant was a university which of-

fered instructional classes and training and plaintiff was injured during a class that was part of a seven-week basic rock-climbing course. Therefore, defendants' motion must be denied as to the waiver. Assuming *arguendo* that defendants had met their burden on this point, there remains a triable issue of fact as to whether the facility was recreational or instructional and thus whether GOL § 5-326 applies to bar enforcement of the release signed by plaintiff. As plaintiff's counsel points out, the acronym AKT is not generally known to the public. Further, Kaiser testified that she would describe defendants' classes as recreational. These facts raise triable issues of fact as to whether Section 5-326 should be applied.

Defendants alternatively argue that plaintiff assumed the risk of injury. "[P]rimary assumption of the risk applies when a consenting participant in a qualified activity "is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks" (*Custodi v. Town of Amherst*, 20 NY3d 83 [2012] citing *Bukowski v. Clarkson Univ.*, 19 NY3d 353 [2012]). The risks which a participate consents to are "known, apparent and reasonably foreseeable" (*id.* citing *Benitez v. New York City Bd. of Educ.*, 73 NY2d 650 [1989]). However, plaintiff argues that she was instructed to misuse the bands, that she relied on such instruction and that did not appreciate the risks of stretching the band "almost 3.5x its maximum stretch".

At a minimum, triable issues of fact preclude summary judgment on this point. The band which injured plaintiff was not her own and she cannot be found on this record to have known the risks of stretching the band as far as she was instructed to as a matter of law. Therefore, defendants' motion on this point is denied as well.

Defendants remaining argument as to the negligence claim is unavailing. They contend that they are entitled to summary judgment because plaintiff cannot demonstrate actual or constructive notice. This argument fails since they have no bearing on plaintiffs' claim that the defendants instructed her to overstretch the bands.

Defendants assert that plaintiffs' breach of implied merchantability claim should be dismissed because they did not sell the bands. However, as plaintiff's counsel points out in opposition, defendants marketed the stretch bands for sale on their Facebook page. However, there is no dispute on this record that plaintiff did not purchase the bands. Therefore, there is no transaction for a warranty of merchantability or fitness to be implied to. Accordingly, this cause of action is severed and dismissed.

Similarly, plaintiff's strict products liability claim must also be severed and dismissed. Plaintiff specifically alleges that she was using the band "in a reasonable manner and in accordance with the packaged instructions" yet plaintiff specifically argues that she was instructed to stretch the band beyond the 2x warning listed in the product information. Indeed, plaintiff does not allege any defect with the band itself, and therefore she cannot transform this ordinary negligence action into one for strict products liability. Accordingly, the fourth cause of action is also severed and dismissed.

The court next considers the discovery motion. In general, defendants argue that the notice to admit seeks two categories of information: the first three items seek information which was already addressed during defendants' two prior depositions and the remainder of the notice should have been asked at a deposition and/or are otherwise improper. Admissions that seek information regarding ultimate issues such as duty and notice or otherwise go to "the heart of the controversy" of a particular case are improper (*see Stanger v. Morgan*, 100 A.D.3d 545 [1st Dept 2012]; *Taylor v. Blair,* 116 AD2d 204 [1st Dept 1986]; *Berg v. Flower Fifth Ave. Hospital,* 102 AD2d 760 [1st Dept 1984]; *Rosario v. City of New York*, 261 AD2d 380 [2nd Dept 1999]). Items such as "[t]he Ceiling Bars were used as anchors for resistance bands used within the Class", "Participants in The Class were instructed to loop their resistance band over the Ceiling Bars", "[o]nce the resistance bands were looped over the Ceiling Bar, participants in The Class were instructed to hold both handles", "[w]hile holding the resistance band handles, participants in The Class were instructed to sit down" and "[o]nce seated and while still holding the resistance band handles, participants in The Class were instructed to lie down" are all improper on a notice to admit. Since the vast majority of the notice to admit goes beyond information permissibly

sought in such a discovery device, defendants' motion for a protective order as to the notice to admit is granted.

Plaintiff is granted leave to serve a new notice to admit which only seeks proper information such as when the ceiling bars were installed, how high the ceiling bars were from the floor, where and/or from whom the bands were purchased and how long the bands were, unstretched, within 30 days. The balance of defendants' motion is denied, since they have failed to establish that plaintiff and/or her counsel engaged in frivolous conduct within the meaning of the court rules.

The parties are directed to meet and confer within 30 days and present a written stipulation to the court setting deadlines for all outstanding written discovery to be so ordered by the court. The deadline to file note of issue is hereby extended to August 27, 2021.

In accordance herewith, it is hereby:

ORDERED that defendants' motion sequence 2 is granted only to the extent that defendants need not respond to plaintiff's notice to admit dated January 7, 2021; and it is further

ORDERED that the balance of motion sequence 2 is denied; and it is further

ORDERED that defendants' motion sequence 3 is granted to the extent that defendants' are entitled to summary judgment dismissing plaintiffs' causes of action for breach of the implied warrant of merchantability and products liability and plaintiff's third and fourth causes of action are severed and dismissed; and it is further

ORDERED that the balance of motion sequence 3 is denied; and it is further

ORDERED that the parties are directed to meet and confer within 30 days and present a written stipulation to the court setting deadlines for all outstanding written discovery to be so ordered by the court. The deadline to file note of issue is hereby extended to August 27, 2021.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 5/18/21
New York, New York

So Ordered:

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