SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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EREZ TADMOR,

Plaintiff,

- against-

Index No.: 111457/10
Submission Date: 5/16/12

NEW YORK JIU JITSU INC.,

Defendant.

DECISION AND ORDER

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For Plaintiff:
Ogen & Sedaghati, P.C.
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New York, NY 10016

For Defendant:
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Papers considered in review of this motion for summary judgment:

Notice of Motion. 1
Aff in Opp 2
Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendant New York Jiu Jitsu Inc. ("NYJJ") moves for summary judgment dismissing the complaint.

Plaintiff Erez Tadmor ("Tadmor") enrolled to become a student at NYJJ's mixed martial arts academy in January 2010. He had no prior formal martial arts training. However, while serving in the Israeli army from 1997 through 2000, he received limited martial arts training, and while working as an air marshal for El Al airlines from 2005 through 2009, he received training in defense against armed attacks. When he enrolled in NYJJ, he was presented with paperwork to complete and sign, but he did not read it before signing because he was not fluent in the English language. NYJJ employee Sean

helped him fill out the paperwork because he did not understand all of the questions. In the section that asked for information about prior training, Tadmor answered "survival krav maga." He explained that the training that he underwent as an air marshal was called "fighting" but he called it "survival krav maga" when filling out the paperwork because he thought that Sean would understand that term best. He also claimed that he signed a document which Sean told him was a film/video release.[1] Tadmor enrolled in a beginner mixed martial arts class.

Steven Williams ("Williams") was Tadmor's instructor. In or about March 2010, Williams suggested that Tadmor try an advanced class. Tadmor asked if Williams thought he would "fit in" in the class. Tadmor claims that Williams told him not to worry about it. On March 11, 2010, Tadmor attended the advanced class, with Williams as instructor as well. During the class, Tadmor first started to fight with a "tall thin guy," and lost the fight. A "stocky guy" then went to fight with the thin guy and when they finished fighting, Tadmor went to fight with the stocky guy. Tadmor told Williams, "It doesn't look like a match" because he felt that it would be tough for him to beat the stocky guy. Williams told him "don't worry about it." Williams told him "listen. I got your back. He knows what he's doing. He's got the skills, the techniques to control himself." The stocky guy grabbed Tadmor's legs and Tadmor fell to the ground and heard a crack in his knee. He underwent two surgeries to his knee.

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[1] That document was in fact a waiver of liability.

Tadmor commenced this action seeking to recover damages for the injuries he sustained to his knee. He alleged that "the instructors and supervisors hired by defendant mis-matched plaintiff with a sparring partner who possessed a highly incompatible level of skill and physical strength, which unnecessarily exposed plaintiff to an unreasonable and substantial risk of serious bodily injury. Furthermore, the instructors and supervisors intentionally and knowingly directed plaintiff and his assigned sparring partner to engage in martial arts techniques which were certain to, and did, result in serious bodily harm to plaintiff, while failing to provide plaintiff with instruction on how to defend himself against such harm."

NYJJ now moves for summary judgment dismissing the complaint, arguing that (1) Tadmor had prior experience in fighting and was a self-defense "expert"; (2) Tadmor assumed the risk of injury when he participated in the class; (3) NYJJ did not breach any duty owed to Tadmor because the class was as safe as it appeared to be and any risk of injury is inherent in mixed martial arts; and (4) Tadmor's claim is barred because he executed a valid release.

In opposition, Tadmor argues that issues of fact exist as to whether NYJJ acted negligently in permitting Tadmor to fight with a more advanced student without taking the precautions of preparing Tadmor or instructing the more advanced students of Tadmor's skill level. Further, he contends that issues of fact exist as to whether NYJJ properly prepared Tadmor for the maneuvers being performed by the students in the

advanced class and whether the other students in that class were directed to avoid dangerous maneuvers for which Tadmor was unprepared.

Tadmor further maintains that an issue of fact exists as to NYJJ's liability based on Tadmor's reliance on Williams' directive and reassurances when he entered into the subject fight. Finally, Tadmor maintains that the waiver of liability that he signed does not bar his action because the waiver does not specify that NYJJ would be released from liability arising out of its own negligence.

Discussion

A movant seeking summary judgment must make a prima facie showing of entitlement to judgement as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

A plaintiff who voluntarily participates in an athletic event is held to assume the risk of "injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation." *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 657 (1989) *quoting Turcotte v. Fell*, 68 N.Y.2d 432, 439 (1986);*Yisrael v. City of New York*, 38 A.D.3d 647 (2nd Dept. 2007). When it is shown indisputably that a particular injury was caused by a condition or practice that is common to a particular

sport, summary judgment is warranted. *Cuesta v. Immaculate Conception Roman Catholic Church*, 168 A.D.2d 411 (2nd Dept. 1990).

However, the assumption of risk doctrine is qualified to the extent that participants do not assume risks that are unreasonably increased or concealed. *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 657 (1989). A landowner's duty of care to a participant is 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. *Ferone v. Sachem C.S.D.*, 225 A.D.2d 518, 518-519 (2nd Dept. 1996). The awareness of the risks assumed is assessed in light of the skill and experience of the particular plaintiff. *Giordano v. Shanty Hollow Corp.*, 209 A.D.2d 760 (3rd Dept. 1994).

Here, Tadmor participated in a beginner martial arts class for approximately two months. Upon his instructor's suggestion, Tadmor attended the advanced class. He first sparred with a"tall thin guy" and lost the fight. A "stocky guy" then approached Tadmor to fight, and after Tadmor expressed some doubt about fighting the larger man, the instructor told Tadmor, "don't worry about it" and "I got your back. He knows what he's doing. He's got the skills, the techniques to control himself." Tadmor was then injured.

The court finds that issues of fact exist as to whether Tadmor assumed the risk of injury through his participation in the advanced class. *Cf. Chimerine v. World Champion John Chung Tae Kwon Do Inst.*, 225 A.D.2d 323 (1st Dept. 1996) *affd* 90 N.Y.2d 471

(1997); *Vendura v. Fasano*, 236 A.D.2d 465 (2nd Dept. 1997). Tadmor's instructor suggested that Tadmor try an advanced class and reassured Tadmor after he expressed doubts about fighting the larger man. Contrary to NYJJ's contention, no evidence has been presented to establish that Tadmor was an advanced mixed martial arts "expert." The court finds that questions of fact exist as to whether the risk of injury which Tadmor was to be exposed to by participating in the advanced class was known, apparent or reasonably foreseeable to him and whether NYJJ exercised reasonable care to protect Tadmor from unassumed, concealed or unreasonably increased risks. *Petretti v. Jefferson Valley Racquet Club*, 246 A.D.2d 583 (2nd Dept. 1998); *Franco v. Neglia*, 3 Misc. 3d 15, 17 (N.Y. App. Term 2004).

Further, Tadmor properly argues that the waiver of liability does not bar his claim. Any agreement that purports to release a tortfeasor from the effects of its own acts or omissions must plainly and precisely state that the limitation of liability extends to negligence or other fault of the party attempting to shed his or her ordinary responsibility. Releases that merely waive any and all claims arising in the future cannot be enforced because they fail to advise the signor that the waiver extends to claims that might arise from the defendant's own negligence. *Rigney v. Ichabod Crane Cent. School Dist.*, 59 A.D.3d 842 (3rd Dept. 2009); *Sweeney v. Hertz Corp.*, 292 A.D.2d 286 (1st Dept. 2002); *Swift v. Ki Young Choe,* 242 A.D.2d 188 (1st Dept. 1998); *Alexander v. Kendall Cent. Sch. Dist.*, 221 A.D.2d 898 (4th Dept. 1995).

Here, the waiver of liability signed by Tadmor indicated that Tadmor would release NYJJ "from any and all claims from injury or damage that may be sustained by [him] while participating in the New York Jiu Jitsu classes." Because the waiver releases NYJJ from "any and all" claims and does not specify that the waiver extends to claims that might arise from NYJJ's own negligence, the waiver signed by Tadmor is unenforceable and can not bar his claim.

In accordance with the foregoing, it is hereby

ORDERED that defendant New York Jiu Jitsu Inc.'s motion for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
August 8, 2012

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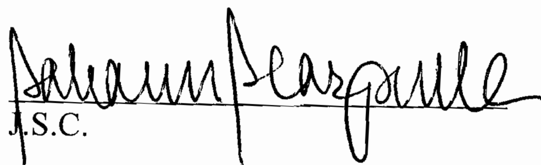

J.S.C.