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2012 IL App (3d) 110761-U

Order filed November 15, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

SUSAN D. HOOVER,	) Appeal from the Circuit Court
	) of the 12th Judicial Circuit,
Plaintiff-Appellant,	) Will County, Illinois,
	)
v.	)
	) Appeal No. 3-11-0761
JUS' FOR FUN, INC., and PIU	) Circuit No. 08-L-555
MANAGEMENT, LLC, Individually and	)
d/b/a PUMP IT UP and/or PUMP IT UP	)
PARTY; and CUTTING EDGE	)
CREATIONS, INC.,	) Honorable
	) Michael J. Powers,
Defendants-Appellees.	) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Carter concurred in the judgment.
Presiding Justice Schmidt specially concurred.

ORDER

¶ 1 *Held*: Judgment in favor of the defendants in a plaintiff's action to recover under the theories of negligence, premises liability, and products liability, for injuries that the plaintiff sustained in the defendants' air-inflated obstacle course, was affirmed on appeal because the exculpatory agreement signed by the plaintiff was valid and enforceable and barred the plaintiff's claims.

¶ 2 The plaintiff, Susan Hoover, broke both of her ankles while using the defendants' air-inflated amusement obstacle course. She brought suit, alleging claims of negligence, premises liability, a violation of the Carnival and Amusement Rides Safety Act, and products liability against the defendants Jus' For Fun, Inc. (Jus' For Fun), and PIU Management, LLC (PIU). The third defendant, Cutting Edge Creations, Inc., was named in the products liability claim, but is not a party to this appeal. The trial court granted summary judgment in favor of Jus' For Fun and PIU. The plaintiff appealed.

¶ 3 FACTS

¶ 4 The plaintiff scheduled her nine-year-old daughter's birthday party at the defendants' place of business, Pump It Up. Upon entering into Pump It Up for the scheduled party, the plaintiff was required to sign an exculpatory agreement. The plaintiff claimed that she did not take the time to read the terms of the exculpatory agreement, but she did sign it. The exculpatory agreement stated:

¶ 5 "I willingly agree to comply with the stated and customary terms, rules and conditions for participation in any party and/or program at Pump It Up. In addition, if I observe any hazard during my participation, I will bring it to the attention of the nearest official immediately;

I am aware that there is a risk of injury from the inflatable equipment, and while particular rules, equipment, and personal discipline reduces the risk, the risk does exist. I knowingly and freely assume all such risks, both known and unknown, even if arising from the negligence of other participants; and

I for myself, and on behalf of my heirs, assigns, personal representatives, and next

of kin, hereby hold harmless, Jus' For Fun, Inc., d/b/a Pump It Up and PIU Management, LLC, their affiliates, officers, members, agents, employees, other participants, and sponsoring agencies with respect to any and all injury, disability, or loss of damage to person or property to the fullest extent of the law."

¶ 6 During the birthday party, the plaintiff entered into the inflatable amusement attraction known as "Chaos," which was an obstacle course. After scaling the first wall, the plaintiff slid down into the valley between the first and second walls and immediately felt and heard both ankles pop. She was transported by paramedics to the hospital, where she had surgery for fractures in both of her ankles.

¶ 7 The plaintiff filed a four-count complaint against the defendants, Jus' For Fun and PIU, both individually and d/b/a Pump It Up, and Cutting Edge Creations, Inc., alleging negligence, premises liability, violations of the Carnival and Amusement Rides Safety Act (430 ILCS 85/2-1 et seq.), and products liability.

¶ 8 Count III, alleging a violation of the Carnival and Amusement Rides Safety Act, was dismissed with prejudice and is not an issue in this appeal. Thereafter, Jus' For Fun moved for summary judgment as to counts I, II, and IV, arguing that the exculpatory clause was valid and enforceable and barred the plaintiff's claims. The plaintiff, in her response to Jus' For Fun's motion for summary judgment, stated that Jus' For Fun was not named as a defendant in the products liability count and, thus, had no standing to request judgment in its favor. In response, the trial court granted summary judgment in favor of Jus' For Fun as to counts I and II, and dismissed with prejudice count IV with respect to Jus' For Fun. The trial court concluded that the exculpatory agreement was valid and enforceable and that the Uniform Commercial Code and

the Landlord and Tenant Act were not applicable.

¶ 9 PIU then moved for summary judgment on the same basis, and the trial court granted the motion. The plaintiff's later *errata* motion to correct the record was granted and part of the plaintiff's response to Jus' For Fun's motion for summary judgment was stricken. However, although the plaintiff alleged in her response to PIU's motion for summary judgment that Jus' For Fun was in the distributive chain, and she sought reconsideration of the trial court's dismissal of the products liability claim against Jus' For Fun, the plaintiff never sought to strike her representation that Jus' For Fun was not named as a defendant in the products liability action. The plaintiff's motion to reconsider both orders was denied, and the plaintiff appealed. .

¶ 10 ANALYSIS

¶ 11 The plaintiff argues that the trial court erred in granting summary judgment in favor of Jus' For Fun and PIU. Summary judgment is proper when, viewed in a light most favorable to the nonmovant, the pleadings, affidavits, depositions, admissions, and exhibits on file reveal there is no issue as to any material fact and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2008); *Williams v. Manchester*, 228 Ill. 2d 404 (2008). In determining whether a genuine issue as to any material fact exists, pleadings, depositions, and admissions are construed against the party moving for summary judgment. *Williams*, 228 Ill. 2d at 417. Summary judgment is not appropriate where the material facts are disputed or where, if the material facts are undisputed, reasonable persons might draw different inferences. *Id.* Summary judgment is appropriate where the plaintiff cannot establish an element of the cause of action. *Id.* We review *de novo* the grant of summary judgment. *Id.*

¶ 12 I. Uniform Commercial Code

¶ 13 The plaintiff argues that it is unconscionable to limit or exclude consequential damages under section 2A-503(3) of the Uniform Commercial Code (UCC) (810 ILCS 5/2A-503 (West 2008)). She argues that the UCC is applicable because the defendants leased the inflatables to her. The defendants argue that there was no lease of goods and the UCC is inapplicable.

¶ 14 The UCC defines a lease as "a transfer of the right to possession and use of goods for a term in return for consideration." 810 ILCS 5/2A-103(1)(j) (West 2006). The defendants argue that there was no transfer of the right to possession of the inflatable amusement device.

¶ 15 The exculpatory agreement signed by the plaintiff was not a lease of goods under the UCC. The plaintiff was simply allowed to use the inflatable device; she was not allowed to move it, inflate it, deflate it, or in any way possess it. Accordingly, since the UCC is not applicable, it is not necessary to address whether the exculpatory agreement is unconscionable under the UCC.

¶ 16 II. Landlord and Tenant Act

¶ 17 The plaintiff argues that the exculpatory agreement violated the public policy of the Landlord and Tenant Act, 765 ILCS 705/1(a) (West 2006). The defendants again argue that the exculpatory agreement did not create a lease, so the exemption provision of the Landlord and Tenant Act had no application.

¶ 18 The Landlord and Tenant Act deems liability exemptions for damages caused by the negligence of a lessor or his agents in the operation or the maintenance of leased property to be void as against public policy and unenforceable. 765 ILCS 705/1(a) (West 2006). The conclusion in the prior section was that the exculpatory agreement did not create a lease as it is defined in the UCC. Under the common law, a lease is a contract that conveys a property

interest, giving possession of the leased premises for the full term of the lease. *Millennium Park Joint Venture, LLC v. Houlihan*, 393 Ill. App. 3d 13 (2009) A lease requires a definite agreement as to: (1) the extent and bounds of the property; (2) the term; and (3) the rental price and manner of payment. *Millennium Park Joint Venture, LLC*, 393 Ill. App. 3d at 25. The plaintiff argues that each of these elements exist in this case.

¶ 19 There was no lease of real property in this case. The exculpatory agreement does not identify any real property, it does not identify a lessee or a lessor, it does not specify a term of a lease, and it does not reference the amount of rent. Thus, the exculpatory agreement was not void under the Landlord and Tenant Act.

¶ 20 III. Enforceability of exculpatory agreement

¶ 21 The plaintiff argues that the exculpatory clause cannot be enforced because it failed to identify the nature of the risk. Specifically, the clause refers to "all such risks," which the plaintiff argues refers to inherent risks, but it did not put the plaintiff on notice that she was exculpating the defendants from their own negligence.

¶ 22 While Illinois law does not favor exculpatory clauses, courts will generally enforce them if the clauses explicitly refer to the type of activity or circumstance that the plaintiff agrees to relieve the defendant from the duty of care. *Hamer v. City Segway Tours of Chicago, LLC*, 402 Ill. App. 3d 42 (2010). Exculpatory clauses are strictly construed against the parties they benefit. *Hamer*, 402 Ill. App. 3d at 45. While the exculpatory clause must clearly reference the type of activity, circumstance, or type of activity to which it is applied, the injury only needs to fall within the scope of the possible dangers from the activity, reasonably contemplated by the parties. *Hamer*, 402 Ill. App. 3d at 45. The precise occurrence need not have been

contemplated; only that it was within the scope of possible dangers ordinarily accompanying the activity. *Garrison v. Combined Fitness Centre, Ltd.*, 201 Ill. App. 3d 581 (1990). Thus, if the clause clearly applies, and in the absence of fraud or wilful and wanton negligence, courts will enforce it unless it is against public policy or there is some special relationship between the parties the weighs against upholding the agreement. *Larsen v. Vic Tanny Int'l*, 130 Ill. App. 3d 574 (1984).

¶ 23 In this case, the plaintiff agreed that she was aware of a risk of injury from inflatable equipment and she assumed all such risks. She was then injured while participating on the inflatable equipment. It seems that the plaintiff's injury was clearly within the scope of possible dangers ordinarily accompanying inflatables. The plaintiff argues that the defendants' negligence was not identified as a risk, but that was clearly within the scope of dangers contemplated by the exculpatory agreement. See *Larsen v. Vic Tanny Int'l*, 130 Ill. App. 3d 574 (1984) (a person by contract may avoid liability for his or her negligence; a specific reference to negligence is not required).

¶ 24 The plaintiff argues that the exculpatory clause was against public policy. Specifically, the plaintiff argues that she was a consumer and that there was a disparity of bargaining power. Also, the plaintiff argues that the policy considerations of the Landlord and Tenant Act should be applicable. However, we have already found that the Landlord and Tenant Act was not applicable to the plaintiff's use of the defendants' inflatables, and if the legislature thought that all exculpatory clauses were against public policy, it would have extended the provisions of the Landlord and Tenant Act, or passed further acts directed at such clauses. See *Kubisen v. Chicago Health Clubs*, 69 Ill. App. 3d 463 (1979). The plaintiff also cannot prevail on her claim that

there was a disparity in bargaining power such that she did not have a free choice. See *Hamer*, 402 Ill. App. 3d at 46. There was no special relationship between the parties; the plaintiff was not an employee of the defendants and the defendants were not common carriers or innkeepers. If the plaintiff had disagreed with the exculpatory clause, she could have simply refused to participate at the defendants' business. We find that the exculpatory clause was valid and enforceable, and there were no contrary public policy considerations that weighed against upholding the clause.

¶ 25 IV. Products Liability

¶ 26 The plaintiff contends that the trial court erred by granting summary judgment in favor of Jus' For Fun and PIU on the products liability claim. She contends that both defendants were involved in the design, manufacture, and placement of the product in the stream of commerce so as to allow a products liability claim. Jus' For Fun and PIU argue that the plaintiff waived her products liability claim against them. If not waived, Jus' For Fun and PIU argue that they were not "sellers" and not subject to strict products liability.

¶ 27 A review of the record reveals that the plaintiff, in her response to Jus' For Fun's motion for summary judgment, indicated that Jus' For Fun was not a named defendant in count IV (the products liability claim). Thus, the trial court's order with respect to Jus' For Fun's motion granted summary judgment in counts I and II, but dismissed with prejudice count IV. The plaintiff's motion for reconsideration acknowledged the dismissal in her introduction and conclusion, but made no argument with respect to the dismissal of count IV. Thereafter, PIU moved for summary judgment, seeking judgment on the same grounds as Jus' For Fun. After PIU filed its motion, the plaintiff filed an *errata* motion to correct the record. That motion was

granted, but it did not strike the portion of the response that stated that Jus' For Fun was not a defendant in the products liability claim. The trial court granted PIU's motion for summary judgment as to counts I, II, and IV.

¶ 28 A party cannot complain of an error when that contention is inconsistent with the position taken earlier by the same party. *Stephens v. Taylor*, 207 Ill. 2d 216 (2003). The trial court dismissed the products liability claim against Jus' For Fun based upon the plaintiff's representation that the plaintiff's own complaint did not state a claim against Jus' For Fun. The plaintiff's *errata* motion did not erase that representation, and the motion to reconsider did not address the issue. As a result of the plaintiff's representation, the products liability claim against Jus' For Fun was not addressed in the trial court. Thus, it appears that the plaintiff has waived her products liability claim against Jus' For Fun. The plaintiff did not make a similar representation regarding PIU in the trial court, so the claim is not waived with respect to PIU.

¶ 29 As the plaintiff acknowledges, the defendant Cutting Edge Creations, Inc. (a nonparty to this appeal) was the manufacturer of "Chaos." But, the plaintiff argues that the actions of PIU in approving equipment for its franchisees to select allowed a products liability claim to attach because it was involved in the design, manufacture, and placing the product in the stream commerce.

¶ 30 It is true that, in a products liability action, all persons in the distributive chain can be liable for injuries resulting from a defective product, on the basis that their role in the marketing process enables them to exert pressure on the manufacturer to enhance the safety of the product. *Hammond v. North American Asbestos Corp.*, 97 Ill. 2d 195 (1983). However, we have already found a valid exculpatory clause in this case, which is applicable to the products liability claim.

Since the injury that the plaintiff sustained was clearly within the scope of possible dangers from the inflatables, and the plaintiff did not allege any type of wilful or wanton negligence, it is not against public policy to enforce that clause to relieve a nonmanufacturing party from liability resulting from alleged negligence in making available a possibly defective product. See *Garrison v. Combined Fitness Centre, Ltd.*, 201 Ill. App. 3d 581 (1990). PIU did not manufacture the inflatables, but simply provided its franchisees with a list of approved manufacturers. The equipment was purchased directly by the franchisees, and shipped from the manufacturers to the franchisees. As such, the trial court properly granted summary judgment in favor of PIU on the products liability claim.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Will County is affirmed.

¶ 33 Affirmed.

¶ 34 PRESIDING JUSTICE SCHMIDT, specially concurring.

¶ 35 I concur in the judgment but write separately to point out that when faced with summary judgment on all counts, plaintiff came forward with no evidence of any negligence on the part of defendants. Plaintiff's entire case rested upon the fact that plaintiff was injured.

¶ 36 Likewise, with respect to the products liability count, plaintiff came forth with no evidence that the product upon which plaintiff was injured was unreasonably dangerous or otherwise defective. Again, plaintiff relies upon the fact that she was injured as evidence of some wrongdoing on the part of defendants.

¶ 37 I write separately only to point out that even without the exculpatory agreement, defendants would have been entitled to summary judgment as plaintiff, when faced with a motion

for summary judgment, came forth with neither evidence of negligent conduct on the part of the defendants nor evidence of a defect in the product upon which she was injured.