2015 IL App (2d) 140402-U
No. 2-14-0402
Order filed March 10, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

KAMIL MACIAS,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	No. 11-L-1418
v.	)	
	)	Honorable
NAPERVILLE GYMNASTICS CLUB,	)	Judges Hollis L. Webster and
	)	John T. Elsner,
Defendant-Appellee.	)	Judges, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* Release agreement for the gym was sufficiently clear, explicit, and unequivocal to show intent to protect facility from liability arising from use of its "foam pit"; it was proper for the gym to raise the issue it had raised in the section 2-619 motion in a summary judgment motion as it alleged new facts which were developed during discovery that affected the validity of the release; affirmed.

¶ 2 Plaintiff, Kamil Macias, filed a complaint against defendant, Naperville Gymnastics Club (the Club), for injuries he received after jumping off a springboard and landing head first into a "foam pit." The trial court denied the Club's motion to dismiss, pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)), but it later granted the Club's motion for summary judgment based on a liability release agreement signed by plaintiff.

Plaintiff raises several issues on appeal concerning the release and the effect of the earlier section 2-619 motion to dismiss. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 15, 2011, plaintiff came to the Club with his friend. The Club offers "open gym" hours where members of the Club and the general public can attend. Plaintiff, who was not a member of the Club, paid a $10 admission fee and he signed a liability release agreement.

¶ 5 A foam pit was located in the gym. After seeing participants jumping into the pit, plaintiff jogged up to a springboard in front of the pit, jumped onto the board and into the pit. While attempting to jump feet first, plaintiff's body moved in the air, causing him to land head first, striking the bottom of the pit. Plaintiff immediately lost all feeling in his body below the neck. He remained in the pit covered by pieces of foam until he was extracted by the Naperville Fire Department. At the time, plaintiff was 20 years old, about 6 feet tall, and weighed 310 pounds. As a result of the accident, plaintiff suffered a broken neck, requiring extensive surgery and rehabilitation. Plaintiff filed a complaint alleging the Club was negligent in its failure to properly supervise the open gym, train participants, and warn participants of hazards and dangers accompanied with activities and use of equipment in the open gym.

¶ 6 The Club filed a section 2-619(a)(9) motion to dismiss (735 ILCS 5/2-619(a)(9) (West 2010)), alleging that plaintiff signed a two-page liability release agreement that contained an exculpatory clause releasing the Club from liability for any acts of negligence.

¶ 7 The trial court found the release ambiguous and denied the section 2-619(a)(9) motion without prejudice. In denying the motion, the judge stated that she felt it was inappropriate to dismiss the suit at that point, that there was case law on both sides of "these exculpatory clauses," and the judge agreed that it was something that could be developed through discovery.

She further stated, "But I think it's something that is better suited for a summary judgment motion if the facts do bear that out from the defense's perspective."

¶ 8 During discovery, plaintiff was questioned by defense counsel and testified to the following:

"Q. Okay. That first part of the form it says, 'To gain admission to the activity areas of [the Club], all parts of this form must be read, understood, and signed.' Do you see that?

A. Yes.

Q. And did you understand what that means?

A. Yes.

* * *

Q. Did you understand this to be an agreement on January 15th, 2011[,] between you and [the Club]?

A. Had I read this agreement I would have understood.

*** * ***

Q. And you understand that [the release] means that when you sign it that you're agreeing to not bring any lawsuit against [the Club]?

A. Correct.

Q. And if you had read it on January 15th of 2011, that's what you would have understood it to mean?

A. Correct.

* * *

Q. And you agree that the sport of gymnastics is a risky sport?

A. Correct.

Q: And you would have felt the same on January 15th, 2011[,] before your accident?

A. Yes."

¶ 9 At the entrance to the gym was a closed door with a window pane in it. Plaintiff did not recall seeing a sign on the door entitled, "Rules of the Gym." Plaintiff reviewed the rules at his deposition and admitted that it said to "Walk around all pits and trampolines," and he stated that he understood what this meant. The rules also stated: "Do not play on any equipment without proper supervision," and "Do not do any gymnastics without proper supervision," and plaintiff stated that he understood what these meant. Plaintiff also stated that he did not see a sign painted on the wall in the gym titled, "Loose foam pit rules." That sign stated: "Look before you leap," "No diving or belly flops," and "Land on feet, bottom or back only." Plaintiff acknowledged that he understood what these meant.

¶ 10 After discovery, the Club filed a motion for summary judgment, arguing that plaintiff's claim was barred by the exculpatory clause of the release signed by plaintiff. The motion included the deposition testimony and that (1) plaintiff denied being given any verbal instructions and denied seeing the warning signs or rules posted in the gym before he was injured, and (2) plaintiff admitted that he would have understood the terms of the liability release, had he read it. Following argument, the trial court granted the Club's motion for summary judgment. This timely appeal follows.

¶ 11 II. ANALYSIS

¶ 12 A. Standard of Review

¶ 13 Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). The motion should be denied if there are disputed facts, but also if reasonable people could draw different inferences from the undisputed facts. *Wood v. National Liability & Fire Insurance Co.*, 324 Ill. App. 3d 583, 585 (2001). We review an order granting summary judgment *de novo*. *Pielet v. Pielet*, 2012 IL 112064, ¶ 30.

¶ 14 We review the parties' liability release agreement in accordance with well-established contract principles. *Joyce v. Mastri*, 371 Ill. App. 3d 64, 74 (2007). The primary objective in construing a contract is to give effect to the parties' intent, and to discover this intent the various contract provisions must be viewed as a whole. *Kerton v. Lutheran Church Extension Fund*, 262 Ill. App. 3d 74, 77 (1994). Words derive meaning from their context, and contracts must be viewed as a whole by examining each part in light of the other parts. *Id*. Contract language must not be rejected as meaningless or surplusage; it is presumed that the terms and provisions of a contract are purposely inserted and that the language was not employed idly. *Id*.

¶ 15 In order for an exculpatory clause to be valid and enforceable, it should contain clear, explicit, and unequivocal language referencing the types of activities, circumstances, or situations that it encompasses and for which the plaintiff agrees to relieve the defendant from a duty of care. *Calarco v. YMCA*, 149 Ill. App. 3d 1037, 1040 (1986). In this way, the plaintiff will be put on notice of the range of dangers for which he assumes the risk of injury, enabling him to minimize the risks by exercising a greater degree of caution. *Neumann v. Gloria Marshall Figure Salon*, 149 Ill. App. 3d 824, 827 (1986). The precise occurrence which results in injury need not have been contemplated by the parties at the time the contract was entered into. *Schlessman v. Henson*, 83 Ill. 2d 82, 86 (1980). It should only appear that the injury falls within the scope of possible dangers ordinarily accompanying the activity and, thus, reasonably

contemplated by the plaintiff. *Garrison v. Combined Fitness Centre, Ltd.*, 201 Ill. App. 3d 581, 585 (1990). Further, when interpreting a contract containing an exculpatory clause, the court must interpret the scope of the exculpatory provision in the "context of the entire agreement." *Shorr Paper Products, Inc. v. Aurora Elevator, Inc.*, 198 Ill. App. 3d 9, 13 (1990). We review the interpretation of an exculpatory agreement or release of liability authorization *de novo*. *Stratman v. Brent*, 291 Ill. App. 3d 123, 137 (1997).

¶ 16 In *Garrison*, a member of a health club who was injured when lifting weights on a bench press brought suit against the club and the manufacturer of the press. The trial court entered summary judgment in favor of the club, and the plaintiff appealed. The First District Appellate Court held that the exculpatory clause could not have been more clear or explicit, as it stated that each member bore the "sole risk" of injury that might result from the use of weights, equipment, or other apparatus provided and that the selection of the type of equipment to be used would be the "entire responsibility" of the member. The court found that the injury the plaintiff sustained clearly fell within the scope of possible dangers ordinarily accompanying the activity of weight-lifting. *Id.* at 585. The court observed that the injury was of a type that would normally be contemplated by the parties at the time the contract was made and, therefore, the court held that it clearly fell within the parameters of the exculpatory clause. *Id.* See also *Hussein v. L.A. Fitness International, LLC*, 2013 IL App (1st) 121426; *Neumann v. Gloria Marshall Figure Salon*, 149 Ill. App. 3d 824 (1986).

¶ 17 Similar to *Garrison* and the cases cited above, the release agreement in the present case is clear and specific regarding the risks it covers and the release of the Club's negligence. It specifically references the inherent risk of injury resulting from landing on landing surfaces, and plaintiff acknowledged in his deposition that this phrase includes the foam pit in which he was

injured. The agreement also releases the Club from any and all claims, including those caused by its negligence. Furthermore, plaintiff's signature certified that he recognized the dangers inherent with climbing and jumping activities and that he voluntarily assumed the risks.

¶ 18 Nevertheless, plaintiff raises several arguments regarding the validity of the release and the effect of the earlier section 2-619 motion.

¶ 19 B. Ambiguity of the Release

¶ 20 1. First Clause

¶ 21 The first clause of the release, which is typed in capital letters, states:

> "BY SIGNING THIS DOCUMENT YOU ACKNOWLEDGE THAT UNSUPERVISED USE OF ANY AREA OF FACILITY IS STRICTLY PROHIBITED AND COMPLETELY AT THE RISK OF THE PARTICIPANT AND THAT THE RULES [OF] EACH AREA BEING UTILIZED ARE UNDERSTOOD PRIOR TO PARTICIPATION!"

Plaintiff asserts that this clause is ambiguous as to whether supervision and a full understanding of the rules of the Club is a condition precedent to releasing defendant from liability. We agree that the first clause, standing alone, might be construed as stating that supervision and a full understanding of the rules of the Club is a condition preceding releasing the Club from liability. However, case law teaches that we must review the language of the release in its entirety in order to interpret the parties' intent.

¶ 22 The release contains a "Covenant Not to Sue for Injury or Damages," which provides, in relevant part:

> "Notice: This is a legally binding agreement. By signing this agreement, you waive your right to bring a court action to recover compensation or to obtain any other remedy for

> any injury to yourself *** however caused arising out of use of the facilities of [the Club].
>
> I hereby acknowledge and agree that the sport of gymnastics and the use of the accompanying equipment has INHERENT RISKS. I have full knowledge of the nature and extent of all of the risks inherent in gymnastics and the use of the facilities of the gym, including but not limited to:
>
> ***
>
> 5. Injuries resulting from landing on the landing surfaces; and
>
> 6. Injuries to bones, joints, tendons, or death.

¶ 23 The section of the release agreement entitled "Release Indemnification Liquidation Damages and Agreement to Arbitrate" states, in relevant part:

> "In consideration of my use of the GYM, I the undersigned user, agree to release on behalf of myself *** [the Club] *** including but not limited to a claim of NEGLIGENCE."

¶ 24 The clause of the release immediately preceding plaintiff's signature provides that "the undersigned recognize[s] the dangers inherent with climbing and jumping activities," and the undersigned is "assuming the hazard of this risk upon myself because I wish to participate. I realize that I am subject to injury from this activity and that no form of pre-planning can remove all of the danger to which I am exposing myself."

¶ 25 In reading the release in its entirety, it is clear that the first clause of the release cannot be construed as plaintiff argues. The release contains no such limitations as it covers a number of activities, including "[i]njuries resulting from landing on the landing surfaces" (*i.e.* the "foam

pit"), releasing the Club from negligence, and "the dangers inherent with climbing and jumping activities."

¶ 26 2. Physical Condition Clause

¶ 27 Two clauses of the release request the participant to agree that he or she is in good physical health and proper physical condition to participate. Plaintiff cites *Calarco v. YMCA of Greater Metropolitan Chicago*, 149 Ill. App. 3d 1037 (1986), and *Macek v. Schooner's Inc.*, 224 Ill. App. 3d 103 (1991), for the proposition that these types of clauses render the release ambiguous, as it is unclear whether the release only applies to injuries resulting from a participant's physical ailments. In other words, the release does not apply to participants without physical ailments.

¶ 28 We fail to follow the logic of plaintiff's argument. However, the cases relied on by plaintiff are readily distinguishable. In *Calarco*, the plaintiff had been injured when metal weights from an exercise machine fell on her hand, breaking her bones. The plaintiff had agreed "to hold free from any and all liability the [defendant] *** for damages which [the plaintiff] may have or which may hereafter accrue to [the plaintiff] arising out of or connected with [the plaintiff's] participation in any of the activities of the [defendant]." We held that the exculpatory clause in the membership application for the defendant's facility was insufficient to protect the defendant from liability as a matter of law because the clause did not adequately describe the covered activities to clearly indicate that defendant's negligence would be covered by the release. *Calarco*, 149 Ill. App. 3d at 1043-44. We further noted that the statement immediately following the alleged exculpatory language contained a declaration of physical health by the signer, and that the combination of the two provisions further complicated the interpretation of the release. *Id.*

¶ 29 In *Macek*, the plaintiff participated in an arm wrestling contest with a machine that broke his arm. The court held that summary judgment was inappropriate because the release did not specify the covered activities but rather merely indicated that damages for "all injuries suffered" are waived. The court found further that the line immediately following the exculpatory language regarding the signer's physical condition provided additional ambiguity. *Id.* at 106.

¶ 30 In both *Calarco* and *Marek*, the releases did not specify the covered activities and did not specifically cover the defendants' negligence. Both courts held that the physical condition clause simply added to the ambiguity of the release. However, contrary to *Calarco* and *Marek*, the release in this case clearly covers the activities in question and specifically releases defendant from liability for its negligence.

¶ 31 3. Inherent Risk Language

¶ 32 Plaintiff argues that the use of "inherent risk" language throughout the release creates an ambiguity as to whether the language covers only dangers inherent in gymnastics and not freak accidents. We also reject this argument. As previously stated, the release specifically lists landing on landing surfaces as an inherent risk. Thus, there is no ambiguity as to whether plaintiff's injury was covered by the release.

¶ 33 C. Forseeability

¶ 34 Plaintiff argues that his injury was not foreseeable because (1) he lacked specialized knowledge of gymnastics and, in particular, foam pits, to appreciate the danger and foresee the possibility of injury, and (2) his injury was not the type that would ordinarily accompany jumping into a foam pit.

¶ 35 A plaintiff who expressly consents to relieve a defendant of an obligation of conduct toward the plaintiff assumes the risk of injury as a result of the defendant's failure to adhere to

the obligation. *Larsen v. Vic Tanny International*, 130 Ill. App. 3d 574, 576 (1984). The doctrine of assumption of risk presupposes, however, that the danger which causes the injury is such that it ordinarily accompanies the activities of the plaintiff, and that the plaintiff knows or should know both the danger and the possibility of injury prior to its occurrence. *Id*. at 576. The standard is a subjective one geared to a particular plaintiff, and the determination ordinarily will be made by a jury. *Id*. at 576-77.

¶ 36 "The foreseeability of a specific danger defines the scope." *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122442, ¶ 14. "The relevant inquiry *** is not whether [the] plaintiff foresaw [the] defendants' exact act of negligence," but "whether [the] plaintiff knew or should have known" the accident "was a risk encompassed by his [or her] release." *Hellweg v. Special Events Management*, 2011 IL App (1st) 103604, ¶ 7.

¶ 37 Thus, the issue here is whether plaintiff knew or should have known that the accident was a risk encompassed by the release which he signed. As previously determined, the language of the release in this case was specific enough to put plaintiff on notice. In discussing inherent risks in the sport of gymnastics and use of the accompanying equipment, the release lists injuries resulting from landing on the landing surfaces, which includes injuries to bones, joints, tendons, or death. Plaintiff agreed that the foam pit was a landing surface and that some of the possible injuries that he could sustain at the gym from gymnastics activities included injuries to his bones, and he admitted at deposition that he had not read the release and that, had he read the release, he would have understood it to mean that he could not sue the gym for any injuries he sustained. Based on these facts, plaintiff should have known the risks of injury associated with the activity of jumping into the foam pit. Plaintiff participated in open gym, which reasonably contemplates participating in the use of the accompanying equipment. Plaintiff could have reasonably

presumed that, should he jump from a springboard into the foam pit, he might land on his head. It is entirely foreseeable that, if plaintiff accidently fell on his head, he would be hurt by "landing on the landing surfaces," a risk encompassed by the release agreement. See *Oelze v. Score Sports Venture*, 401 Ill. App. 3d 110, 121 (2010). Although plaintiff suffered a serious injury, we are bound by the release agreement. Accordingly, we find the trial court properly granted summary judgment on the basis that the release barred plaintiff's negligence claim.

¶ 38 D. Public Policy

¶ 39 Plaintiff next argues that it would be against public policy to enforce the release in this case because the Club opened its gym to the unskilled and inexperienced public. Plaintiff does not cite any cases in support of this argument. In fact, the only case he cites, *Hamer v. City Segway Tours of Chicago, LLC*, 402 Ill. App. 3d 42 (2010), is inapposite to his position.

¶ 40 Several cases have rejected plaintiff's argument in the fitness club setting. See, *e.g.*, *Kubisen v. Chicago Health Clubs*, 69 Ill. App. 3d 463 (1979); *Owen v. Vic Tanny's Enterprises*, 48 Ill. App. 2d 344 (1964). Had plaintiff, an adult, read the release and disagreed with it, he could have simply refused to participate in open gym. "While exculpatory or limitation of damages clauses are not favored and must be strictly construed against a benefitting party [citation] the basis for their enforcement is the strong public policy favoring freedom of contract." *Rayner Covering Systems, Inc. v. Danvers Farmers Elevator Co.*, 226 Ill. App. 3d 507, 512 (1992). There does not seem to be any reason in this case to depart from the strong public policy of allowing parties to freely enter into contracts.

¶ 41 E. Section 2-619 Motion to Dismiss

¶ 42 The Club filed a section 2-619 motion, alleging that plaintiff signed a two-page liability release that contained an exculpatory clause, which released the Club from liability for any acts

of negligence. The trial court found the release was ambiguous and denied the motion. However, the court recognized that disputed facts might affect the validity of the release and indicated that the Club was free to raise the issue again in a summary judgment motion after facts surrounding the execution of the release were developed in discovery.

¶ 43 Citing *Makowski v. City of Naperville*, 249 Ill. App. 3d 110, 117-18 (1993), plaintiff acknowledges that a trial court may allow a party to reassert a defense after previously ruling on the merits only when new evidence is presented. Plaintiff claims that the summary judgment motion did not allege new facts but simply relied on the language of the release as it did in the Club's section 2-619 motion. We disagree.

¶ 44 The Club did allege additional facts in its summary judgment motion that were developed during discovery that affected the validity of the release. Those facts included plaintiff's acknowledgment that he understood the meaning of the terms of the release, that he understood the inherent risks, and that he understood that the risk of "landing on landing surfaces" would include the foam pit where he was injured. He also testified that had he read the release he would have understood its language to mean that he could not sue the gym for any injuries he sustained. Since we review a summary judgment motion *de novo* (*Pielet*, 2012 IL 112064, ¶ 30), this evidence tends to defeat plaintiff's ambiguity arguments.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the judgment of the Circuit Court of Du Page County granting the Club's motion for summary judgment.

¶ 47 Affirmed.