IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Matthew Scherman,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 21 12311
	)	
Fitness International, LLC Individually and d/b/a L.A. Fitness, and d/b/a Esporta Fitness,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

An exculpatory agreement constitutes an express assumption of risk in which one person consents to relieve another of a particular obligation. Here, the defendants' exculpatory agreement clearly and explicitly put the plaintiff on notice of the possible range of dangers for which the plaintiff assumed the risk of injury, including the one in this case. Since the exculpatory agreement is enforceable, the defendants' motion to dismiss must be granted.

Facts

On August 29, 2018, Matthew Scherman executed a membership agreement with Fitness International, LLC ("Fitness"). The agreement provides that, "[b]y signing this agreement, Buyer acknowledges that Buyer is of legal age, has received a filled-in and completed copy of this entire Agreement . . . has read and understands the entire Agreement, including but not limited to the . . . **Release and Waiver of Liability and Indemnity.** . . ." The Release and Waiver of Liability and Indemnity ("Release") provides:

> **IMPORTANT: RELEASE AND WAIVER OF LIABILITY AND INDEMNITY. You hereby acknowledge and agree that use by Member and/or Member's minor children of the facilities, services, equipment or premises offered by LAF ("LAF" as used in this provision includes LA Fitness, its affiliates, and their respective officers, directors, employees and agents) involves risks of injury to persons and property. Member understands, voluntarily accepts and assumes full responsibility for such risks, which include (but are not limited to) injuries arising from use of**

exercise equipment and machines; injuries arising from participation in supervised or unsupervised activities or programs; injuries and medical disorders arising from exercising such as heart attacks, strokes, heat stress, sprains, broken bones, and torn muscles and ligaments, among others; accidental injuries occurring in dressing rooms, showers and other facilities; and injuries so severe they result in permanent disability, head injury, paralysis, and even death. Further, in consideration of Member and Member's minor children being permitted to enter any facility of LAF (a "Club") for any purpose including, but not limited to, observation, use of facilities, services or equipment, or participation in any way, Member agrees that LAF will not be liable for any injury to the person or property of Member and/or Member's minor children, and Member hereby releases and holds harmless LAF from all liability to Member, Member's children and Member's personal representatives, assigns, heirs, and next of kin for any loss or damage, and forever gives up any claim or demands therefore, on account of injury to person or property, including injury leading to death, whether caused by the active or passive negligence of LAF or otherwise, and whether related to exercise or not, to the fullest extent permitted by law, while Member and/or Member's minor children are in, on, or about Club premises or using any LAF facilities, services or equipment. Member also hereby agrees to indemnify LAF from any loss, liability, damage or cost LAF may incur due to the presence of Member and/or Member's children in, on or about Club premises or in any way observing or using any facilities or equipment of LAF, whether caused by the negligence of Member(s) or otherwise. You also represent (a) that Member and Member's minor children are in good physical condition and have no disability, illness, or condition that could prevent Member(s) from exercising without injury or impairment of health, and (b) that Member has consulted a physician concerning an exercise program that will not risk injury to Member or impairment of Member's health. Member further expressly agrees that this release and waiver of liability and indemnity is intended to be as broad and inclusive as permitted by the law of the state of Georgia and that if any portion is held invalid, the balance shall continue in full force and effect. Member has read this release and waiver

of liability and indemnity and agrees that no oral representations, statements or inducement apart from this Agreement have been made.

On December 30, 2019, Matthew Scherman was injured while using a plate-loaded Smith machine at a Fitness facility. On December 9, 2021, Scherman filed his one-count negligence cause of action against Fitness. Scherman alleges the Smith machine failed to prevent the weighted bar from falling on him, causing his injuries. Scherman claims Fitness negligently failed to: (1) inspect the Machine properly to ensure it was in reasonably safe working order; (2) detect or realize the Machine was not in safe working order; and (3) remove, replace, or warn patrons that the Machine was not in safe working order. On February 22, 2022, Fitness filed its motion to dismiss. The parties fully briefed the motion.

<u>Analysis</u>

Fitness brings its motion to dismiss pursuant to the Code of Civil Procedure section 2-619. 735 ILCS 5/2-619. A section 2-619 motion to dismiss authorizes the involuntary dismissal of a claim based on defects or defenses outside the pleadings. *See Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion must construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *See Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). A court is not to accept as true those conclusions unsupported by facts. *See Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. As has been stated: "The purpose of a section 2-619 motion is to dispose of issues of law and easily proved issues of fact early in the litigation." *Czarobski*, 227 Ill. 2d at 369.

Fitness argues its motion to dismiss is authorized by section 2-619(a)(9), which authorizes dismissal based on affirmative matter outside the pleadings. 735 ILCS 5/2-619(a)(9). Fitness's central argument is that the membership agreement contains an exculpatory clause barring Scherman's suit.

As has been explained, "[a]n exculpatory agreement constitutes an express assumption of risk wherein one party consents to relieve another party of a particular obligation." *Platt v. Gateway Int'l Motorsports Corp.*, 351 Ill. App. 3d 326, 330 (5th Dist. 2004). An agreement containing a release or exculpatory clause is a contract, and its legal effect is to be decided by the court as a matter of law. *Hamer v. Segway Tours of Chicago, LLC*, 402 Ill.

App. 3d 42, 44 (1st Dist. 2010). "Courts construe contracts to give effect to the intention of the parties as expressed in the language of the agreement." *Cox v. U.S. Fitness, LLC*, 2013 IL App (1st) 122442, ¶ 13. Illinois law upholds the freedom of individuals to enter into mutually binding contracts, including those with exculpatory provisions. *Harris v. Walker*, 119 Ill. 2d 542, 548 (1988); *Johnson v. Salvation Army*, 2011 IL App (1st) 103323, ¶ 19. Illinois will not "interfere with the rights of two parties to contract with one another if they freely and knowingly enter into the agreement." *Garrison v. Combined Fitness Centre, Ltd.*, 201 Ill. App. 3d 581, 584 (1st Dist. 1990).

Illinois courts have recognized the unique nature of exculpatory clauses. "Although exculpatory agreements are not favored and are strictly construed against the party they benefit, parties may allocate the risk of negligence as they see fit, and exculpatory agreements do not violate public policy as a matter of law." *Evans v. Lima Lima Flight Team, Inc.*, 373 Ill. App. 3d 407, 412 (1st Dist. 2007) (citation omitted). Parties may rely on their agreement in the absence of fraud, willful and wanton negligence, or substantial disparity in their bargaining power, or the presence of some other factor in the parties' relationship that militates against upholding their agreement. *Garrison*, 201 Ill. App. 3d at 584; *Harris*, 119 Ill. 2d at 548; *Tyler Enterprises of Elmwood, Inc. v. Skiver*, 260 Ill. App. 3d 742, 750 (3d Dist. 1994). Exculpatory agreements are contrary to public policy if they are between: (1) an employer and employee; (2) the public and those charged with a duty of public service; or (3) parties in which there is a disparity of bargaining power such that the agreement does not represent the plaintiff's free choice, such as a monopoly. *White v. Village of Homewood*, 256 Ill. App. 3d 354, 358-59 (1st Dist. 1993).

To be enforceable, exculpatory clauses must contain "clear, explicit, and unequivocal language referencing the type of activity, circumstance, or situation . . . it encompasses and for which [one party] agrees to relieve the [other party] from a duty of care." *Offord v. Fitness Int'l, LLC*, 2015 IL App (1st) 150879, ¶ 20 (quoting *Platt*, 351 Ill. App. 3d at 330). At the time the parties execute the agreement, it is immaterial whether they contemplate the precise cause of the injury that later transpires. *Garrison*, 201 Ill. App. 3d at 584. At the same time, the defendant must put the plaintiff on notice of the possible range of dangers for which the plaintiff assumes the risk. *Offord*, 2015 IL App (1st) at ¶ 20. Such disclosure allows the plaintiff to exercise a greater degree of caution and minimizes the risk of injury. *Platt*, 351 Ill. App. 3d at 330. Most importantly, the scope of an exculpatory clause is defined by the foreseeability of the specific danger. *Id.* (citing *Larsen v. Vic Tanny Int'l*, 130 Ill. App. 3d 574, 577 (5th Dist. 1984)). The relevant inquiry is not whether the plaintiff foresaw the defendant's exact negligence, but whether the plaintiff knew or should have known the accident was a risk

encompassed by the release. *Hellweg v. Special Events Mgmt.*, 2011 IL App (1st) 103604, ¶ 7; *Cox*, 2013 IL App (1st) 122442, ¶ 14. It should be evident that the injury falls within the scope of possible dangers ordinarily accompanying the activity and is, therefore, reasonably contemplated by the plaintiff. *Platt*, 351 Ill. App. 3d at 331.

Scherman argues the Release is unenforceable because it is vague and overbroad. Specifically, Scherman contends that because the Release did not explicitly state that he waived potential liability for injuries arising from the use of defective equipment, the exculpatory provision does not bar his claims. Despite these arguments, it is well established that exculpatory clauses may be broadly worded. *Harris*, 119 Ill. 2d at 549. They must "contain clear, explicit, and unequivocal language referencing the types of activities, circumstances, or situations that [are encompassed]," *Garrison*, 201 Ill. App. 3d at 585, but "[t]he precise occurrence which results in injury need not have been contemplated by the parties at the time the contract was entered into." *Id.*

Here, the Release states in relevant part that:

> **Member understands, voluntarily accepts and assumes full responsibility for such risks, which include (but are not limited to) injuries arising from use of exercise equipment and machines. . . . Member hereby releases and holds harmless LAF from all liability to Member . . . for any loss or damage, and forever gives up any claim or demands therefore, on account of injury to person or property, including injury leading to death, whether caused by the active or passive negligence of LAF or otherwise, and whether related to exercise or not, to the fullest extent permitted by law.**

The Release contains clear and explicit language referencing injuries "arising from the use of the exercise equipment and machines." Contrary to Scherman's position, the Release did not need to explicitly state that Scherman was releasing liability for injuries arising from the use of defective equipment. Instead, "[i]t 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*, 201 Ill. App. 3d at 585, 559. An injury from the use of defective equipment is plainly an injury that falls within the scope of injuries "arising from use of exercise equipment and machines" whether they are defective or not. Scherman was, therefore, on notice that he assumed the risk of injuries pertaining to the use of Fitness's exercise equipment and machines.

The release in this case is distinguishable from those Scherman cites in which injuries occurred that were outside the scope of the exculpatory provision. *See, e.g., Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716 (falling mirror not within scope of possible dangers ordinarily accompanying fitness club use); *Larsen,* 130 Ill. App. 3d 574 (injury from noxious chemical gasses used by health club was beyond scope of exculpatory agreement). Scherman also urges the application of *Calarco v. YMCA*, 149 Ill. App. 3d 1037 (2d Dist. 1986), in which the court found the exculpatory language was not sufficiently clear, explicit, and unequivocal to protect the gym from liability arising from the use of its equipment. *Calarco* is, however, distinguishable because the exculpatory provision did not even reference the use of equipment or machines. *Id.* at 1043.

Scherman also argues that to give effect to the exculpatory provision would contravene public policy. According to Scherman, the enforcement of the exculpatory provision would be unconscionable because it would insulate Fitness from virtually any form of liability. In determining whether an exculpatory provision is against public policy, courts have considered whether: (1) there was a disparity in bargaining power between the two parties, resulting in a compulsion to sign, and whether the services could be obtained elsewhere; and (2) the services were so essential to the public, they were "a practical necessity." *Hussein v. L.A. Fitness Int'l, L.L.C.*, 2013 IL App (1st) 121426, ¶ 18.

The first prong suggests the membership agreement was an adhesion contract while the second prong suggests the services being offered should be publicly regulated instead of governed by contract law. *Id.* An adhesion contract is a standardized contract prepared entirely by one party, and which, because of the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis. *Abbott v. Amoco Oil Co.*, 249 Ill. App. 3d 774, 776 (1993). Importantly, adhesion contracts are generally lawful and the mere disparity of bargaining power constitutes insufficient grounds to vitiate contractual obligations. *Id.* Something beyond adhesion is required to subject a contract to judicial scrutiny. *Id.*

In this case, nothing about the parties or the services provided suggest the agreement's exculpatory terms should be negated. Scherman voluntarily applied for a membership and agreed to the terms that came with the membership. He failed to identify any circumstances suggesting that he had no choice but to join the club and become subject to the broad exculpatory terms in the membership agreement or that enforcing the exculpatory clause would contravene the public policy. The clause is clear, explicit, and unequivocally states that a member's use of the equipment and machines

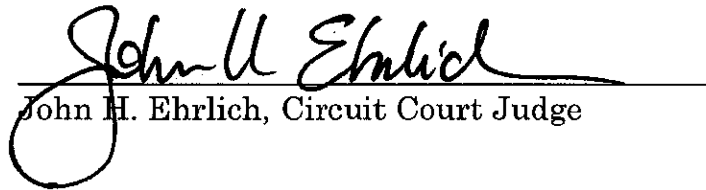
involved risks of injury, including injury leading to the death of the member, and that the member assumed full responsibility for such risks. Further, this is plainly not a social relationship that would balance against upholding the exculpatory clause.

In this case, the exculpatory clause affirmatively bars Scherman's lawsuit. Certainly, upholding the exculpatory clause in this instance leads to a harsh result. Illinois law is, nevertheless, consistent and has rejected contentions similar to Scherman's.

Conclusion

For the reasons presented above, it is ordered that:

The defendants' motion to dismiss is granted with prejudice.



John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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