SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2350-15T4

MICHAEL TORRES,

Plaintiff-Appellant,

v.

KRANK L.L.C., AND
RAMON OMAR ESCOBAR,

Defendants-Respondents,

and

KRANK SYSTEMS L.L.C., AND
KRANK SYSTEMS JERSEY CITY, INC.,

Defendants.

Telephonically argued April 19, 2017 –
Decided June 12, 2017

Before Judges Hoffman and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3613-14.

Patrick H. Cahalane argued the cause for appellant (Anglin, Rea & Cahalane, P.A., attorneys; Mr. Cahalane, on the briefs).

Christina T. Williamson argued the cause for respondents (McCormick & Priore, P.C.,

attorneys; Ms. Williamson and Philip D. Priore, on the briefs).

PER CURIAM

Plaintiff appeals from a January 22, 2016 order granting summary judgment to defendant Krank L.L.C. (Krank), a private gym. We affirm.

Plaintiff joined Krank in March 2011 at its Nutley location. When plaintiff joined, he signed a membership commitment, waiver, and release of liability form. The form's letterhead said Krank Systems, but was also stamped with

> Krank, L.L.C.
> Pete Islip/Rob Morales
> 386 Franklin Ave., Rear
> Nutley, NJ 07110
> 973-320-2600
> www.kranksystems.com

The form included the following language:

> I hereby release and covenant not-to-sue KRANK SYSTEMS, [L.L.C.] and/or either entities, its officers and/or owners, their members, staff, volunteers, landlords, agents or assigns from any and all present and future claims resulting from ordinary negligence on the part of KRANK SYSTEMS, [L.L.C.] or any other listed above for property damage, personal injury, or wrongful death, arising as a result of engaging or receiving instruction in gymnastics, tumbling, or any other activities or any activities incidental thereto, wherever, whenever, or however the same may occur. I hereby voluntarily waive any and all claims against KRANK SYSTEMS, [L.L.C.] and/or any others listed above resulting from ordinary negligence, both present and future,

> that may be made by me, my family, estate, heirs, agents, representatives, or assigns.
>
> I understand that Open Class activities involve certain risks, including but not limited to death, serious neck and spinal injuries resulting in complete or partial paralysis, brain damage, and serious injury [to] bones, joints & muscles. Mats, equipment, and other safety equipment, and apparatus provided for protection, including the active participation of a coach or teacher who will spot or assist in the performance of certain skills, may be inadequate to prevent serious injury. I am voluntarily allowing my child(ren) and/or myself to participate in this activity with knowledge of the risks involved and hereby agree to accept any and all inherent risks of property damage, personal injury, or death.
>
> I understand that this waiver is intended to be as broad and inclusive as permitted by the laws of the state of New Jersey and agree that if any portion here is held invalid, the remainder of the waiver will continue in full legal force and effect. I further agree that the venue for any legal proceedings shall be within the state of New Jersey.

The waiver provided, "I have read and understand the Waiver and Release of Liability," which plaintiff initialed.

Plaintiff began working out at Krank's Jersey City location in 2012. On June 30, 2012, plaintiff executed a second membership commitment form, waiver and release form, which contained the same language. On February 3, 2013, plaintiff injured his Achilles tendon in a "run block" class while performing an exercise using a resistance band. Defendant Ramon Omar Escobar was the class

instructor. Escobar ran the class on Sundays when the gym was closed, and advertised the class using flyers, word of mouth, and social media. The class cost an additional fee not included with gym membership, and several people were participating in the class at the time of plaintiff's injury.

Plaintiff filed a complaint on November 20, 2013, in Middlesex County and an amended complaint on January 16, 2014. The amended complaint listed Krank L.L.C., Krank Systems L.L.C., Krank Systems Jersey City, Inc., and Omar Escobar as defendants. Defendants moved to change venue in April 2014, and the court transferred the case to Essex County. Plaintiff filed a second amended complaint in October 2014, to replace Omar Escobar with Ramon Omar Escobar.

Defendants, relying on the waivers, moved for summary judgment. The motion was heard on January 22, 2016. The judge determined the waiver released Krank L.L.C. from liability, plaintiff had no separate claim against Krank Systems L.L.C., and the waiver was fully applicable to the class where plaintiff was injured. The judge granted defendants' motion for summary judgment, and this appeal followed. On appeal, plaintiff challenges the motion judge's conclusions.

When reviewing a grant of summary judgment, we adhere to the same standard as the motion judge. Globe Motor Co. v. Iqdalev, 225 N.J. 469, 479 (2016) (quoting Bhagat v. Bhagat, 217 N.J. 22,

38 (2014)); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.) (citing Antheunisse v. Tiffany & Co., Inc., 229 N.J. 399, 402 (App. Div. 1988), certif. denied, 115 N.J. 59 (1989)), certif. denied, 154 N.J. 608 (1998). We review to determine "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). If no genuine issue of fact exists, we then decide whether the trial court's ruling on the law was correct. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987).

The motion judge herein found no material facts in dispute and considered two legal issues: 1) whether or not Krank L.L.C. and Krank Systems L.L.C. were different companies, therefore not protected by the waiver plaintiff signed; and 2) whether the waiver applied to Escobar's class. Upon reviewing the parties' submissions, the judge rejected the argument Krank L.L.C. and Krank Systems L.L.C. were different entities. The judge also rejected the suggestion the waiver did not apply to Escobar's class because the waiver expressly included "open classes," which included Escobar's class. Applying the Supreme Court's analysis in Stelluti v. Casapenn Enters., LLC, 203 N.J. 286 (2010), the

motion judge determined plaintiff waived his right to sue when he signed the waiver, or exculpatory agreement. We agree.

"[T]o be enforceable an exculpatory agreement must 'reflect the unequivocal expression of the party giving up his or her legal rights that this decision was made voluntarily, intelligently and with the full knowledge of its legal consequences.'" Id. at 304-05 (quoting Gershon, Adm'x Ad Prosequndum for Estate of Pietroluongo v. Regency Diving Ctr., 386 N.J. Super. 237, 247 (App. Div. 2004)). The Supreme Court found four factors to consider when enforcing an exculpatory agreement. Id. at 304 (quoting Gershon, supra, 386 N.J. Super. at 248). Such an agreement

> will be enforced if (1) it does not adversely affect the public interest; (2) the exculpated party is not under a legal duty to perform; (3) it does not involve a public utility or common carrier; or (4) the contract does not grow out of unequal bargaining power or is otherwise unconscionable.
>
> [Ibid.]

In Stelluti, the New Jersey Supreme Court determined an exculpatory agreement limiting a private gym from liability did not adversely affect public interest, nor was it contrary to a legal duty owed. Id. at 306-13. Private gyms cannot waive away the "duty of reasonable or due care to provide a safe environment for doing that which is in the scope of the invitation" owed to

business invitees, Walters v. YMCA, 437 N.J. Super. 111, 117 (App. Div. 2014) (quoting Stelluti v. Casapenn Enters., LLC, 408 N.J. Super. 435, 975 (App. Div. 2009), aff'd, Stelutti, supra, 203 N.J. at 461), and always maintain a "duty not to engage in reckless or gross negligence." Stelutti, supra, 203 N.J. at 313.

Plaintiff argues the scope of the waiver did not cover Escobar's class, asserting the run block class was not an "open class" under the agreement. Plaintiff claims the term "open class" was ambiguous, and therefore, the judge should not have granted summary judgment.

We disagree. While the agreement did not define "open class," the motion judge found "open class" meant "open to members of the gym," and based on the language in the waiver, "is exactly the type of activity that the Stelutti case intended to protect these gyms from." The judge supported the finding with evidence in the record the run block class was not a private one-on-one training session, and any member could have paid an additional fee and taken the class.

We also reject the argument the waiver only applied to Krank Systems L.L.C., not defendant Krank L.L.C. Krank Systems L.L.C. was not in existence as a legal entity in 2011 when plaintiff originally signed the waiver. Plaintiff could not have been waiving his rights to sue a non-existent entity. The waiver also

included a stamp with "Krank L.L.C." at the top, and testimony from Mr. Morales, an owner of the Krank gyms, explained Krank used the name "Krank Systems L.L.C." the same way as "Krank L.L.C." before Krank Systems L.L.C. incorporated. We also reject plaintiff's argument the waiver does not cover Escobar because he was an employee of Krank L.L.C. and not Krank Systems L.L.C.

We likewise reject the contention the waiver only applied to injuries sustained incidental to gymnastics or tumbling, and does not release defendant from liability for injuries. The agreement applies to injuries "as a result of engaging in or receiving instruction in gymnastics, tumbling, or any other activities or any activities incidental thereto." Plaintiff argues "thereto" only modifies "gymnastics" and tumbling"; however, "thereto" also modifies "or any other activities." "Any other activities" includes the open classes discussed above, and here, the run block class.

Moreover, the waiver states if "any portion herein is held invalid, the remainder of the waiver will continue in full force and legal effect." Even removing the "open class" provision, plaintiff still agreed to waive his right to sue.

Plaintiff also argues the issue of gross negligence should have gone to a jury. We disagree. Gross negligence is "more than ordinary negligence, but less than willful or intentional

misconduct" and constitutes "a higher degree of negligence." Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 364 (2016). "Gross negligence is an indifference to another by failing to exercise even scant care or by thoughtless disregard of the consequences that may follow from an act or omission." Id. at 364-65.

Here, the record does not support a finding that defendant's actions constituted gross negligence. Plaintiff did not complain of pain or discomfort while performing the exercise until his injury occurred. He completed several repetitions of the exercise prior to the injury and never informed the instructor he needed to stop performing the exercise. We do not consider plaintiff's injury any more foreseeable than any other types of injury commonly associated with athletic endeavors. The record does not support defendants' actions rising to this "higher degree of negligence."

Affirmed.