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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5084-16T2

KYUNG PAK,

Plaintiff-Appellant,

v.

NJ FITNESS FACTORY, INC.,

Defendant/Third-Party
Plaintiff-Respondent,

v.

FITNESS MOTION, LLC,

Third-Party Defendant.

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Submitted April 10, 2018 – Decided April 19, 2018

Before Judges Fisher and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4384-16.

Goidel & Siegel, LLP, attorneys for appellant (Bryan M. Goldstein, on the briefs).

Law Offices of Daniel J. McCarey, LLC, attorneys for respondent (Daniel J. McCarey and Jennifer N. Plant, on the brief).

PER CURIAM

In this personal injury case, plaintiff appeals from an April 28, 2017 order granting summary judgment to defendant NJ Fitness Factory, Inc. (the fitness club). In entering the order and dismissing the case, the judge relied on Stelluti v. Casapenn Enterprises, LLC, 203 N.J. 286 (2010). We conclude Stelluti is distinguishable and reverse.

Plaintiff participated in an exercise class at the fitness club. The fitness club required plaintiff to sign an acknowledgment of liability waiver form (the waiver form), which states in part that

> I . . . waive any and all claims I may have . . . against [the fitness club] in connection with or arising out of my participation with [the fitness program] . . . . I understand that any exercise program carries with it some risk and acknowledge that risk. Further, in consideration of my participation in the [fitness] program, I agree . . . to release, indemnify, and hold harmless . . . [the fitness club] . . . from all liability for any personal injury . . . I might sustain during this [fitness] program.

Unlike the exculpatory clause in Stelluti, the waiver form did not address plaintiff exercising at her own risk or exculpating the fitness center for injuries sustained while engaging in strenuous activity.

The fitness club maintained a policy of keeping treadmills running after use. The treadmill also contained no visual markings

on the belt to alert users that the machine was running. Plaintiff's accident, which caused a substantial injury requiring spinal surgery for a fractured neck, was unrelated to using physical fitness equipment while engaging in strenuous exercises involving an inherent risk of injury. Rather, a fitness club employee directed plaintiff to step onto a running treadmill. Plaintiff, without knowing the tread was running, stepped onto the machine, which threw her off the spinning belt. The fitness club changed its policy after plaintiff's accident.

On appeal, plaintiff argues primarily that the judge misapplied the Stelluti decision. She contends that the waiver form here is different than the exculpatory clause in Stelluti. She maintains that the waiver form is unenforceable because it did not contain language that she agreed to engage in activities at her own risk, and that the waiver form did not attempt to exculpate the fitness center for injuries caused from the use of fitness equipment.

When reviewing an order granting summary judgment, we apply "the same standard governing the trial court." Oyola v. Liu, 431 N.J. Super. 493, 497 (App. Div. 2013). We owe no deference to the motion judge's conclusions on issues of law. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Applying these standards, we respectfully conclude the judge erred.

It is a longstanding principle of law that business owners in New Jersey have well-established duties of care to patrons that enter their premises. Stelluti v. Casapenn Enters., LLC, 408 N.J. Super. 435, 446 (App. Div. 2009), aff'd, 203 N.J. 286 (2010). An owner has a duty to guard against any dangerous conditions that the owner knows about or should have discovered; and to conduct reasonable inspections to discover latent dangerous conditions. See Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 434 (1993). Any attempt to limit these duties by directing patrons to sign exculpatory agreements requires careful attention by our courts. Indeed, our Supreme Court has stated that exculpatory agreements "have historically been disfavored in law and thus have been subjected to close judicial scrutiny." Stelluti, 203 N.J. at 303.

An exculpatory agreement, and we submit the waiver form, is enforceable 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.
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> [Gershon v. Regency Diving Ctr., Inc., 368 N.J. Super. 237, 248 (App. Div. 2004); see also Stelluti, 203 N.J. at 304.]

Applying these principles, we concluded in Walters v. YMCA, 437 N.J. Super. 111, 120 (App. Div. 2014), that the exculpatory

agreement with the YMCA was unenforceable. Pursuant to that agreement, Walters released the YMCA for injuries he sustained while he was on the YMCA premises or from YMCA-sponsored activity. Id. at 116. Walters slipped on a step leading to an indoor pool at the YMCA. Id. at 116-17. Like plaintiff, Walters was not engaged in strenuous exercises involving an inherent risk of injury.

Plaintiff is correct that the exculpatory clause in Stelluti is different than the waiver form. Nevertheless, applying the Gershon factors, we also conclude the waiver form is unenforceable. It adversely affects the public interest by transferring the redress of civil wrongs from the responsible tortfeasor to either an innocent injured party or society-at-large. It eviscerates the common law duty of care that the fitness center owes to its invitees. And it is unconscionable, as the fitness center has attempted to shield itself from all liability based on a one-sided agreement that offered no countervailing or redeeming societal value.

Like in Walters, we conclude Stelluti is factually distinguishable. The Court's holding in Stelluti is grounded on the recognition that health clubs are engaged in a business that offer their members a place to use physical fitness equipment by performing strenuous exercises involving an inherent risk of

injury. Stelluti, 203 N.J. at 311. Plaintiff did not engage in any activity involving an inherent risk of injury. She followed the instructor's direction and unknowingly stepped onto a running treadmill. Unlike the plaintiff in Stelluti, who was involved in strenuous activity and injured herself while riding a spin bike, id. at 313, plaintiff injured herself while engaged in non-strenuous activity.

Reversed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION