

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

MELISSA SHARPSTEEN,

Plaintiff,

vs

File No. 92-5731-NI
HON. PHILIP E. RODGERS, JR.

SHANTY CREEK MANAGEMENT, INC.,

Defendant.

Grant W. Parsons (P38214)
Attorney for Plaintiff

Margaret A. Costello (P41868)
Attorney for Defendant

DECISION AND ORDER

Defendant submits a Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (10) based upon a release of liability which Plaintiff signed. Defendant argues that there is no genuine issue as to any material fact which would warrant the rescission or invalidation of the release. Plaintiff timely responds to the Court's Prehearing Order by requesting that the Court deny Defendant's motion. Plaintiff asserts that a question of fact remains as to whether Plaintiff knowingly released all claims of liability against Defendant. Plaintiff seeks summary disposition in her favor, asserting there are no facts to support a valid release. The Court will dispense with oral argument. MCR 2.119(E)(3).

Plaintiff's action is one for a personal injury sustained while she was skiing with equipment rented from Defendant. The basis of Plaintiff's claim is that her left ski failed to release upon her fall, causing injury to her left knee. Plaintiff states that Defendant breached its duty to use reasonable care in selecting, fitting, adjusting and equipping Plaintiff with suitable skis and bindings and breached its warranty of fitness for the use

intended by providing equipment which was not reasonably safe or fit for its intended use.

Plaintiff went to Shanty Creek for a ski outing arranged by her employer. Defendant provided the Rental Agreement and Release of Liability forms to Plaintiff's employer for distribution to those employees participating in the skiing event. There is no dispute that Plaintiff initialed and signed the rental agreement and release of liability form provided to her by her employer. There also is no dispute that Plaintiff, a non skier, was injured when she fell while skiing on an advanced slope on Defendant's premises and while using Defendant's equipment. Finally, there is no dispute that Plaintiff, an intelligent person and a college graduate, can read and was capable of understanding the language of the release form had she chosen to read it.

The issue, then, is whether Plaintiff knowingly released Defendant from liability and whether Plaintiff may rescind or invalidate the release on the theory that she did not know what she was signing or believed it to be something other than a release of liability.

The Court has reviewed the motion and response brief together with the depositions, admissions, affidavits and other documentary evidence submitted by the parties in making its determination on the motion. Pursuant to the applicable standard of review and for the reasons set forth ahead, Defendant's motion is granted.

The standard of review for a (C)(7) motion is set forth in Moss v Pacquing, 183 Mich App 574, 579 (1990).

"In considering a motion for summary disposition under MCR 2.116(C)(7), a court must consider any affidavits, pleadings, depositions, admissions, and documentary evidence then filed or submitted by the parties. MCR 2.116(G)(5). In this case, all of Plaintiffs' well-pled factual allegations are accepted as true and are to be construed most favorably to Plaintiffs. Wakefield v Hills, 173 Mich App 215, 220; 433 NW2d 410 (1988). If a material factual question is raised by the evidence considered, summary disposition is inappropriate. Levinson v Sklar, 181 Mich App 693, 697; 449 NW2d 682 (1989); Hazelton v Lustig, 164 Mich App 164, 167; 416 NW2d 373 (1987)."

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741 (1989).

"A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).

The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372."

Taking Plaintiff's factual allegations as true and giving the benefit of all reasonable doubt to Plaintiff as the party in opposition to the motion, the Court is satisfied that the record does not leave open a material factual issue for trial. Plaintiff signed the release of liability form thereby releasing the Defendant from any claim of liability for injuries Plaintiff might sustain while participating in the sport of skiing. Plaintiff has failed to produce evidence which raises a factual issue of fraud or misrepresentation as to the release.

Plaintiff can only seek to rescind or to invalidate the release upon a showing that she was "induced by some stratagem, trick or artifice" by the Defendant. Paterek v 6600 Ltd, 186 Mich

App 445, 450; 465 NW2d 342 (1990), citing Christensen v Christensen, 126 Mich App 640, 645; 337 NW2d 611 (1983) lv den 417 Mich 1100.45 (1983). Plaintiff's reliance upon the unpublished memorandum opinion and order of Braun v Mount Brighten Inc is misplaced. For a determination of this motion, Paterek is undistinguishable and controlling.

Plaintiff Paterek's action was one for a personal injury he sustained to his leg while participating in an organized softball game on the Defendant's recreational field. Prior to the start of the season, Paterek signed a release of liability wherein he agreed not to sue the park or anyone connected with it for injuries or damages sustained while on Defendant's premises. Paterek was subsequently injured and filed suit claiming the recreational field was improperly maintained. Paterek alleged that at no time was the document he signed explained to him as a release or waiver of his rights for any claims of damages that may result from using Defendant's recreational field. The trial court granted Defendant summary disposition pursuant to MCR 2.116(C)(7) and (10).

On appeal, the Court held that there was no intentional or fraudulent misrepresentation as to the nature of the document Plaintiff signed; that a release cannot be invalidated on the basis that it was not read or its terms were different than what the signor believed absent a showing of fraud or mutual mistake and that the argument that the release was invalid for lack of consideration was without merit.

Therefore, for Plaintiff to succeed in her asserted claim, she must prove that:

- (1) The Defendant made a material representation,
- (2) It was false,
- (3) The Defendant knew it was false when made, or made it recklessly, without knowledge of its truth and as a positive assertion,
- (4) It was made with the intention to induce reliance by the Plaintiff,
- (5) The Plaintiff acted in reliance upon it, and
- (6) The Plaintiff thereby suffered injury.

State-William Partnership v Gale, 169 Mich App 170, 178; NW2d (1988). Plaintiff has not established any of the requisite elements necessary to prove misrepresentation or fraud to overcome Defendant's motion for summary disposition.

The release Plaintiff signed contained a plain and clear statement directly before the signature line that the signor acknowledged carefully reading the agreement and release of liability and understood its contents [Release, Defendant's Exhibit D]. Plaintiff twice placed her initials within the appropriate boxes and twice signed her name on the signature lines directly below the release language within the document.

In Plaintiff's deposition she states she did not read any portion of the release form [Sharpsteen trans p 102 ln 2 - 19, and Plaintiff's affidavit in opposition]. Plaintiff then admits to reading and signing the second portion of the release form [trans p 103 ln 23 through p 104 ln 9]. At page 104 ln 10 -13, Plaintiff admits to having written in her boot size and skier type on the release, but states she did not read anything within box number one of the release. Within box number one, the following unambiguous language appears:

I have carefully read this agreement and release of liability and fully understand its contents. I am aware that this is a release of liability and a contract between myself and the ski shop and I sign it of my own free will. I have also read section 3 of this form and will be responsible for obtaining all of the information referred to in that section and providing it to the use of this equipment.

Section 3 of the release form which Plaintiff signed directs the signor not to sign until the equipment has been received. Section 3 reads as follows:

I agree that I understand how the ski-boot-binding system works, and I have been instructed in its proper use. Any questions I have had about this equipment have been fully and satisfactorily answered. I agree that the binding release/retention setting numbers appearing in the visual indicator windows on the binding correspond to the binding release/retention settings recorded on this form. I agree to check this ski equipment before each use, including the Teflon pad (AFD) under my boot sole,

and that I will not ski if any parts are worn, damaged, or missing. I have read, understood and fully agree to the terms and conditions set forth in Section 1 of this form.

While Plaintiff submits her affidavit in opposition to Defendant's motion and in support of her assertion that she believed the release she signed to be a "sign-up sheet or something of the sort," Plaintiff's affidavit does not provide a factual basis to distinguish Defendant's motion from the ruling set forth in Paterek, supra. Plaintiff cannot seek to rescind or invalidate the release based upon her failure to read the document or her belief it was something other than a release absent fraud or mutual mistake. Id. at pg 450; Otto Baedeker & Associates v Hamtramck State Bank, 257 Mich 435, 438; 241 NW 249 (1932); Rowady v K Mart Corp, 170 Mich App 54, 60; 428 NW2d 22 (1988). Moffit v Sederlund, 145 Mich App 1, 8; 378 NW2d 491 (1985), lv den 425 Mich 860 (1986).

Plaintiff's assertion that she did not knowingly and fairly release Defendant of any liability turns on her affidavit and deposition testimony submitted in opposition to Defendant's motion, which evidence must be critically viewed in the determination of a motion for summary disposition. MCR 2.116(G)(4). Crossley v Allstate Ins Co, 139 Mich App 464, 468; 362 NW2d 760 (1984); Metropolitan Life Insurance Co v Reist, 167 Mich App 112, 121; 421 NW2d 592 (1988). Certainly, when a party challenges a release, that party has the burden to prove it should be set aside. VanAvery v Seiter, 383 Mich 486; 175 NW2d 744 (1970).

Plaintiff has failed to allege an intentional or fraudulent misrepresentation was made to her by Defendant regarding the terms of the release which Plaintiff signed. There has been no evidence submitted to support a misrepresentation was made by Defendant with the intent of deceiving Plaintiff. Trongo v Trongo, 124 Mich App 432, 435; 335 NW2d 60 (1983) lv den 417 Mich 1100.32 (1983).

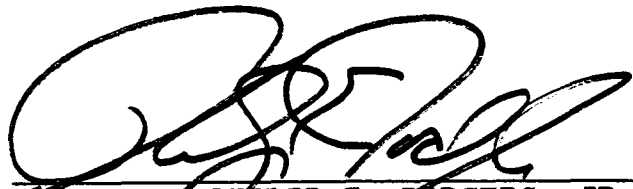
There has been no documentary evidence submitted by Plaintiff to support the allegation that the release is against public policy, or that Defendant failed to use due or reasonable care in providing or maintaining the equipment Plaintiff used during the

skiing outing. St Paul Insurance v Guardian Alarm, 115 Mich App 278, 283; 320 NW2d 244 (1982); Klann v Hess Cartage Co, 50 Mich App 703, 706; 214 NW2d 63 (1973); Tope v Waterford Hills Racing Corp, 81 Mich App 591, 600; 265 NW2d 761 (1978).

The Court will also follow the holding in Paterek at p 451 on the issue of consideration. There was a legal detriment, which induced Plaintiff's promise to release Defendant from any injuries resulting while skiing, and Plaintiff's promise to release the Defendant from liability induced the Defendant to suffer the detriment. Lawrence v Ingham Co Health Department 160 Mich App 420, 428-429; 408 NW2d 461 (1987) (dissent of Sawyer, J.), lv den 429 Mich 864 (1987).

Plaintiff cannot rest upon mere allegations, unsupported by documentary evidence when opposing a motion for summary disposition which challenges the factual basis of the claim. Fulton, Id. at p 735. As the party in opposition to the motion, Plaintiff has failed to sustain her burden of demonstrating the existence of a genuine issue of material fact that the release she signed was fraudulently misrepresented by the Defendant. There is simply no evidence of fraud, misrepresentation or a mutual mistake. Rizzo, Id. at p 372; VanAvery, Id. at p 489-490. Defendant's motion for summary disposition is granted. MCR 2.116(C)(7). Plaintiff's request for summary disposition on the release issue is denied.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

2/17/93