SCANNED ON 10/22/2009

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Index Number : 111989/2008

SCHNORE, AARON

VS.

JOHNNY UTAHS

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

[movant (π) failed to appear ; s/J submitted on default (s)]

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
OCT 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE ______ FOR THE FOLLOWING REASON(S):

Dated: 10/13/09

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

AARON SCHNORE,

Plaintiff,

-against-

JOHNNY UTAHS LLC d/b/a JOHNNY UTAHS and "JOHN DOE" (name unknown), and employee of JOHNNY UTAHS LLC,

Defendants.

Decision/Order
Index No.: 111989/08
Seq. No.: 001

Present:
Hon. Judith J. Gische
J.S.C.

FILED
OCT 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def n/m [3212] w/ RW affid, JMR affirm, exhs	1
LBS affirm in opp, AS affid, exhs	2
JMR rply affirm, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

This action arises from personal injuries plaintiff Aaron Schnore sustained when he was allegedly violently thrown from a mechanical bull owned and operated by the defendant Johnny Utahs LLC d/b/a Johnny Utahs. Johnny Utahs now moves for summary judgment dismissing the complaint. Schnore opposes the motion.

Issue has been joined and the note of issue has not yet been filed. Therefore, summary judgment relief is available. CPLR § 3212. Brill v. City of New York, 2 NY3d 648 (2004).

According to the affidavit of Robert Werhane, President of the company which

owns Johnny Utahs, the restaurant is western-themed and consists of a bar and dining area. "There is also a mechanical bull, which patrons can ride free fo charge. At no time have patrons ever been charged to ride the mechanical bull. Also, [defendant] has never required that patrons pay a 'cover charge' to enter the premises."

Schnore alleges that on May 7, 2008 he was a patron at Johnny Utahs. There is no dispute that Schnore was not charged a fee to enter Johnny Utahs. Schnore maintains in his affidavit that he became inebriated from "having drunk 3 pints of Hoe Garden Beer" and "not having eaten prior thereto." After Schnore became inebriated, he claims the following:

> Everyone was brought a form [entitled "Release of Liability and Indemnity Agreement"] to sign at the same time. I was required to sign this document, which I did not read which the defendants now claim was a release. I was unaware of the legal consequences or content of this document as I was intoxicated. It was neither read to me nor explained to me. It was just something they told me I had to sign before I could ride. While riding the bull well for around 40 seconds, I could see that the operator was displeased that he could not throw me off. He then, in my opinion, intentionally ramped up the speed violently, throwing me off the mechanic (sic) bull causing me to be thrown and become injured.

Johnny Utahs has provided to the court a copy of the Release of Liability and Indemnity Agreement (the "Release") signed by Schnore and including his printed name, Driver's License number, the date, plaintiff's home address and plaintiff's email address. The Release provides, in pertinent part:

> I understand that riding the Mechanical Bull can be dangerous, and that the risk of injury is significant, including the potential for permanent paralysis and death, and while particular rules, equipment, and personal discipline may reduce this risk, the risk of serious personal injury does exist even when the activity is conducted in accordance with all such rules. I further understand that there are inherent and other risks and danger associated with this activity, which may be known and unknown, and which include, but are not limited to, mechanical and equipment

failures. I recognize that falling off the Mechanical Bull is a common and ordinary occurrence, and I understand that accidents, injury, illness, incapacity or death and property damage can arise in conjunction with participating in the above activity. In consideration for riding the Mechanical Bull, I hereby freely and expressly agree to accept and assume any and all risks in connection with such activity.

...

I further knowingly and freely agree to forever release, discharge, waive, save and hold harmless, indemnify, and defend Johnny Utahs, its owners, subsidiaries and/or affiliates, its officers, shareholders, employees, agents, and all other applicable landowners, sponsors and insurance carriers (hereinafter "Releasees") from and against any and all claims, demands, causes of action, liabilities, actions and any and all medical expenses or other related expenses, including damage to property, asserted by others, by me, or on my behalf, my estate, executors, heirs, or assignee or under any theory of legal liability INCLUDING ORDINARY NEGLIGENCE, arising directly or indirectly out of my use of the Mechanical Bull or my presence at Johnny Utah's. The above release includes, but is not limited to, any and all damages occasioned in the event of an incident, illness, or other incapacity, death or damage to property, however caused.

Johnny Utahs has also provided a copy of a Johnny Utah's Incident Report Form (the "Incident Report") filled out by the Floor Manager on the date of the accident, Josh Webber. In the Incident Report, Mr. Webber wrote the following: "Aaron was on the bull having a bull ride and dismounted. When dismounting, he extended his arm to brace his fall and upon doing that he landed awkwardly on his arm and laid still holding his left arm. ... I witnessed the entire event."

Schnore has asserted two causes of action in his complaint: negligence against Johnny Utahs and assault and battery against John Doe. Johnny Utahs moves for summary judgment, arguing that the Release bars plaintiff's negligence claim, and that plaintiff's assault and battery claim is legally deficient. Schnore contends that summary judgment is premature, that he lacked capacity to sign the Release, that material issues

of fact preclude summary judgment and that the Release violates GOL § 5-326.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Only if it meets this burden, will I t then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film , 3 N.Y.2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd dept. 2003).

The negligence claim

The defendant argues that it is entitled to summary judgment on Schnore's

negligence claim because it was released from any claims arising from its ordinary negligence.

Schnore argues that the Release should be deemed unenforceable as against public policy pursuant to GOL § 5-326, which provides:

> Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void against public policy and wholly unenforceable.

The defendant contends that GOL § 5-326 does not apply here because riding the mechanical bull was free and no fee was charged. The court agrees based upon the express wording of GOL § 5-326, legislative intent behind the statute and the case law.

Prior to the enactment of GOL § 5-326, although disfavored, exculpatory provisions were upheld so long as the provision clearly expressed the intention of the parties to relieve a defendant from liability, there was no special legal relationship between the parties and no overriding public interest against enforcing the subject provision. Ciofalo v. Vic Tanney Gyms, Inc., 10 NY2d 294 (1961). By enacting GOL § 5-326, the legislature intended to protect users of amusement and recreational facilities who were unaware of the effect of liability waivers printed in small type on tickets for admission and other writings (see Mem of Econ Dev Bd, Bill Jacket, L 1976 ch 414).

By installing the mechanical bull, Johnny Utahs created a place of amusement or

recreation (see Meier, *supra*). Schnore entered into the Release to use the mechanical bull. However, the court rejects Schnore's argument that the defendant was compensated for his use of the mechanical bull via plaintiff's purchase of alcoholic beverages.

In Meier v. Ma-Do Bars, Inc., the plaintiff sued for serious personal injuries he sustained while riding a mechanical bull in the defendant's bar (106 AD2d 143 [3d Dept 1985]). Meier rode the mechanical bull upon payment of a $2 fee and execution of a "Liability, Release, Indemnification and Authorization" agreement. The defendants moved for summary judgment arguing that the Release barred Meier's claims. The Third Department held that the release at issue was void under GOL § 5-326 because the mechanical bull was an amusement device for which the bar received a fee to use and enjoy.

The distinguishing feature between Meier and the instant case, that Meier paid a fee to specifically use the mechanical bull, as opposed to Schnore who did not pay any such fee, is significant. In this respect, this case is more similar to Beardslee v. Blomberg, another Third Department case, which found that GOL § 5-326 did not apply to a release signed by the plaintiff where the fee paid was for an admission ticket, not plaintiff's later voluntary participation in a race (70 AD2d 732 [3d Dept 1979]). Here, Schnore's payment for his alcoholic beverages was separate from his voluntary decision to ride the mechanical bull, for which he did not pay any fee. To conclude that the defendant was compensated by Schnore's use of the mechanical bull vis-a-vis attracting Schnore to its establishment and Schnore's consequent purchase of beverages for on-premises consumption would alter the meaning of GOL § 5-326 and

would be inconsistent with the legislature's intent.

Schnore next argues that he lacked capacity to enter into the Release because he was intoxicated at that time. An intoxicated person, however, may be capable of making a contract, "depending upon the effect of the intoxication upon his understanding and mental capacity" (McKeon v. Van Slyck, 223 NY 392 [1918]; see also Restatement Second of Contracts § 12[2]). Plaintiff bears the burden of proof that he lacked the capacity to sign the release because of his intoxication (see Smith v. Comas, 173 AD2d 535 [2d Dept 1991]; Dwyer v. Dwyer, 190 Misc2d 319 [NY Sup 2001]).

Thus, the mere fact that Schnore was intoxicated is not, in and of itself, sufficient to vitiate the Release. Plaintiff has not presented any admissible evidence to raise a triable issue of fact such as an expert's report or witness statements. Plaintiff's self-serving affidavit that he did not know what he was signing because of his intoxication is insufficient to raise a triable issue of fact. Moreover, the ambulance call report taken shortly after the incident occurred does not indicate that plaintiff was intoxicated or that intoxication was even expected.

Relatedly, since the only factual issue at this juncture that would be outcome determinative on Schnore's first cause of action is whether he lacked capacity to enter into the Release due to his intoxication, summary judgment on this claim is not premature. CPLR § 3212 (f). Plaintiff has failed to demonstrate how additional discovery would bolster his claim of incapacity to contract, and consequently, summary judgment is not premature on the negligence claim.

Accordingly, the defendant is entitled to summary judgment dismissing the first

ORDERED that the defendant is directed to provide the name of the employee (or employees) who operated the mechanical bull on the date of plaintiff's accident within thirty days from the date of this decision.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
October 13, 2009

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.

FILED
OCT 22 2009
COUNTY CLERK'S OFFICE
NEW YORK