

O'Connell v Macy's Corporate Servs., Inc.

2016 NY Slip Op 31716(U)

September 9, 2016

Supreme Court, New York County

Docket Number: 153272/2014

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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Keri O'Connell

Plaintiff,

Index No. 153272/2014

-against-

Macy's Corporate Services, Inc. and its affiliates,
Macy's Parade and Entertainment Group, Macy's, Inc.
and Jeff Stanton

Defendants.

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KALISH, J.:

Upon the forgoing papers, the Defendants' motion for summary judgment dismissing the Plaintiff Keri O'Connell's underlying action is granted as follows:

Relevant background and procedural history

Without reiterating the entirety of the pleadings, in the underlying personal injury action, the Plaintiff alleges in sum and substance that on or about November 28, 2013, she was struck by an all-terrain-vehicle driven by the Defendant Jeff Stanton. At the time of the accident both the Plaintiff and the Defendant Jeff Stanton were volunteers at the Macy's Thanksgiving Day Parade (the "Parade"), the Plaintiff assigned as a handler for one of the balloons and Stanton assigned to trail the balloon handlers in an all-terrain-vehicle. The Plaintiff claims that her injury was the direct result of the Defendants' negligence. Specifically, the Plaintiff claims that her alleged damages are a direct result of Stanton's negligent operation of the all-terrain-vehicle and the remaining Defendants' negligent supervision of Stanton as they assigned him to operate said all-terrain-vehicle.

The Defendants now move for summary judgment dismissing the Plaintiff's action.

Parties' Assertions

The Defendants argue in sum and substance that the Plaintiff is precluded from pursuing a negligence action against them as the Plaintiff agreed to a release of liability (the "Release") as part of her online application to volunteer at the Parade. Specifically, the Defendants allege that as part of her application to be a balloon handler at the Parade, the Plaintiff electronically consented to the Release, which fundamentally precludes her underlying negligence action.

The Defendants attach with their moving papers an affidavit by Preeti Sharma who indicates that she is the chief digital officer for VGD, an information technology firm employed by Macy's Parade and Entertainment Group. Sharma states that she oversees and manages the Online Registration Application (the "Application") for the Parade, and is personally familiar with the mechanics of the Application.

Sharma states that there are several layers of security by which the application program records and preserves the electronic consent of every applicant to the Release, and by means of which Macy's can verify that the Plaintiff electronically consented to the Release. Sharma stated that the user credentials that the Plaintiff entered at the log in to the Application were specific to the Plaintiff, consisting of an email address and a password defined by Macy's.

Sharma states in relevant part that the registration/application is a linear step-by-step through process, wherein the applicant cannot advance to the next step/page without first completing all of the required elements of each prior step/page. Sharma further states that the initial state of the Release step/page is generic in nature, with a blank name field. Sharma attests that the full text of the Release is prominently displayed on the applicant's screen, including a "bold headline" explicitly identifying the document as a "release". Sharma indicates that in order for the applicant to proceed to the next step in the application, the applicant must first enter their name in the provided field of the Release and check a box confirming their understanding and acceptance of the terms as described in the Release. Sharma

further indicates that upon the applicant's advance from the Release to the next screen, a PDF of the Release is generated and saved within the server's file system.

The Defendants also attach with their moving papers an affidavit by Carolynn Castillo, who states that she is the senior manager of event operations at the Macy's Parade & Entertainment Group. Castillo states that she maintains true and accurate copies of all of the volunteer applicants' Releases, including the Plaintiff's Release, in Castillo's files in the ordinary course of business. Castillo further states that immediately after the Parade, all releases from all registrants are provided to her from VGD, which maintains and preserves them in the ordinary course of business after each registrant's electronic consent. Castillo states that VGD provided the releases labeled according to the applicant's names, which is how Castillo maintains the Releases in her office and how she retrieved the Plaintiff's Release.

The Defendants attach with their papers a copy of a document entitled "**Macy's Thanksgiving Day Parade Release**". Said document has the Plaintiff's name and a checked check-box. Next to the check-box is the following statement: "By checking this box and submitting my application, I confirm that I understand and accept these terms in full".

In opposition, the Plaintiff argues in sum and substance that there is an issue of fact as to whether or not the Plaintiff knowingly and voluntarily entered into the Release. Specifically, the Plaintiff states in her affidavit that "I have never been presented with or shown a waiver related to my participation in the Macy's Thanksgiving Day Parade. I did not voluntarily or intentionally relinquish and waive my right to sue for the injuries I sustained related to participation in the Macy's Thanksgiving Day Parade." The Plaintiff further argues that the only action the Plaintiff voluntarily and agreed to do was to participate in the Parade as a balloon handler.

The Plaintiff further argues that based upon the deposition testimony of Susan Tercero, a representative of Macy's volunteers were not required to electronically sign the release but only electronically "sign-off" on the release.

The Plaintiff further argues that the Release provided by the Defendants in the underlying action provides general language for a release of any and all responsibility or liability of any nature, and as such would not survive the judicial scrutiny applied to releases of liability.

In addition, the Plaintiff argues that if the Court finds that the Release was valid, that the Release only releases and discharges the Defendant Macy's Inc. and not the Defendant Stanton from liability. The Plaintiff argues that Stanton had a duty of care to keep his vehicle under control and to reduce his speed to a safe level. Plaintiff further states that there are material issues of fact as to whether Stanton used the level of ordinary care that a reasonably prudent person would have used under the same circumstance, and whether or not the accident was foreseeable.

In reply to the Plaintiff's opposition, the Defendants argue that the Plaintiff's consent to the release of liability was unambiguous. The Defendants further argue that the Plaintiff's affidavit denying she consented to the release does not create an issue of fact, as it contradicts her deposition testimony that she could not recall the specifics of the application but clicked through everything required to complete the application process and recalled clicking a consent box of some sort.

The Defendants further argue that the plain language of the release includes the Defendant Stanton as an agent of Macy's. Specifically, the Defendants argue that Stanton's status as a volunteer does not alter his status as Macy's agent, given that at the time of the accident Stanton was acting under the instructions and serving the interests of Macy's.

Oral Argument

On August 9, 2016, the Parties appeared before this Court for oral argument on the Defendants' motion. The Defendants referred to the Plaintiff's testimony that she received an e-mail from her aunt, who had submitted the Plaintiff's name to Macy's indicating that the Plaintiff wanted to participate in the Parade. The Defendants argued that Macy's sent the Plaintiff an e-mail with log-in information, which included a link to the online application process. Defendants' counsel indicated that he was unaware of what stage in the Application the Release was placed, but reiterated the argument that the Plaintiff could not have skipped any pages of the online application without completing and providing all of the requested information. This included the Plaintiff typing her name on the Release and checking the box indicating that she understood and consented to the terms of the Release. Defendants' counsel argued that the primary form of consent was for the Plaintiff to check the check-box on the Release, which she did.

In opposition, Plaintiff's counsel argued that the Plaintiff did not knowingly and voluntarily relinquish and/or waive any rights. Plaintiff's counsel argued that the Plaintiff did not see the Release, whether online or in paper form. Plaintiff's counsel further argued that the Plaintiff agreed to being a participant as a balloon handler in the Parade as part of the Application, but she never agreed to any terms of the Release. Specifically, Plaintiff's counsel argued that the Plaintiff only entered her name in the section of the Application that requested general background information and only checked a box to indicate that she was applying to participate in the parade, not that she was agreeing to the terms of the Release. Plaintiff's counsel was unaware as to whether or not the online Application included more than one check-box and/or a check-box other than the check-box for the Release. Plaintiff's counsel further argued that the Defendant Stanton was not covered under the Release as he was not an employee of Macy's.

In reply, Defendants' counsel argued that Stanton fell within the scope of the Release as he was a volunteer for Macy's during the Parade. Defendants' counsel further reiterated the argument that by writing her name and checking the check-box on the Release, the Plaintiff acknowledged that she knowingly and voluntarily agreed to the terms of the Release.

During the course of oral argument, the Court requested that the Defendants submit a supplemental affirmation including screen-shots of the online Application in sequence. The Court also allowed the Plaintiff to submit a supplemental affirmation in opposition. The Parties were given the opportunity to request further oral argument on the motion in their supplemental papers, which the Defendants requested in their supplemental affirmation. However, upon review of the Parties' supplemental papers, the Court finds that no additional oral argument is necessary.

Defendants' Supplemental Affirmation

The Defendants argue in their supplemental affirmation that the Plaintiff could not have completed the online volunteer application without reviewing and consenting to the release. The Defendants attach with their supplemental affirmation, a second affidavit from Sharma, screen shots from a "generic" online 2013 balloon handler application and copies of the "first steps" of the Plaintiff's completed online application.

Sharma states in her second affidavit that in 2013, VGD created in the ordinary course of business, electronic back-ups of data stored on its computer system for Macy's online registration application. She further states that VGD maintains said back-ups in the ordinary course of business. Sharma refers to the screen-shots attached with her affidavit as a true and accurate screen-by-screen copy of a "generic" 2013 balloon handler application for the Parade as retrieved from VGD's back-ups. As an example, Sharma states that some of the attached screen shots show error messages in order to demonstrate that it would be impossible for an applicant to progress to the next screens of the

application or submit the application without completing all of the required information and consenting to the terms of the Release. Sharma (as stated in her previous affidavit) describes the online application as a linear process requiring the applicant to proceed step-by-step through the process without the option of skipping any steps or going to the next step without completing all of the required elements of each prior step. Sharma further states that the applicant's data is captured at each page advance.

Sharma also refers to the screen shots of the first steps of the Plaintiff's online application. Sharma states that said screen shots show the Plaintiff's online application through the release page, and that said screen shots were retrieved from electronic storage disks that VGD maintained in the ordinary course of business. Sharma states that the additional information submitted by the Plaintiff (or any other applicant) in the sections of the Application following the Release would not have been saved for Macy's use in a screen shot format. As such, it is not currently possible to recreate the screen shots of the remainder of the Plaintiff's application beyond the release. Sharma states that the Plaintiff's application would have been displayed in the same order and format as the attached generic application. Sharma further states that the Plaintiff would not have been able to complete/submit the online application without filling in all the information required on the Release and checking the box to confirm her consent to said terms.

The Plaintiff argues in the supplemental affirmation in opposition that the Plaintiff definitively testified at her deposition that she had never seen the Release or the information contained in the Release. The Plaintiff further argues that the screen shots of the portions of the Plaintiff's online application (as attached to the Defendants' supplemental affirmation) show that the Release reads over two different screens, with the check box and the Plaintiff's printed name on the second screen. The Plaintiff argues that this differs from the generic online application (as attached to the Defendants' supplemental affirmation), in which the entire release is located on the same screen.

Analysis

Summary Judgment Standard

It is well established that “[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law” (Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc., 96 AD3d 551, 553 (NY App Div 1st Dept 2012) [internal quotation marks and citation omitted]). “Thus, the movant bears the burden to dispel any question of fact that would preclude summary judgment” (*id.*). “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (Giuffrida v Citibank Corp., 100 NY2d 72, 81 [2003]). “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted)). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002)).

The Defendants are entitled to summary judgment dismissing the underlying action based upon the Plaintiff knowingly and voluntarily agreeing to the Release.

“In the absence of a contravening public policy, exculpatory provisions in a contract, purporting to insulate one of the parties from liability resulting from that party's own negligence, although disfavored by the law and closely scrutinized by the courts, generally are enforced, subject however to various qualifications. Where the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence, the agreement will be enforced. Such an agreement will be viewed as wholly void, however, where it purports to grant exemption from liability for willful or grossly negligent acts or where a special relationship exists between the parties such that an overriding public interest demands that such a

contract provision be rendered ineffectual” (Lago v Krollage, 78 NY2d 95, 99-100 (NY 1991); see also Hsu v Krav Maga NYC, LLC, 138 AD3d 463 (NY App Div 1st Dept 2016); Blog v Battery Park City Auth., 234 AD2d 99 (NY App Div 1st Dept 1996); Princetel, LLC v Buckley, 95 AD3d 855 (NY App Div 2d Dept 2012)).

Further, “[a]s a general matter, a party will not be excused from reading a document that he or she has signed, including a release from liability” (Blog v. Battery Park City Auth., 234 A.D.2d 99, 101 (NY App Div 1st Dept 1996)). As such a party who signed a release is presumed to have read the contents of said release.

New York Technology Law § 302(3) defines an “electronic signature” as “an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record”. In addition, New York Technology Law § 304(2) states that “[i]n accordance with this section unless specifically provided otherwise by law, an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand” (See also Martin v Portexit Corp., 98 AD3d 63 (NY App Div 1st Dept 2012)). Further, even where an electronic writing includes a printed name as opposed to an “electronic signature” as defined by the Electronic Signatures and Records Act, a printed name on an electronic document will be treated as a signature where the record supports the conclusion that the Plaintiff in effect signed the electronic document. Specifically, if there is some indication that the author purposefully added their name to the electronic document it can be treated as a consent (See Forcelli v Gelco Corp., 109 AD3d 244 (NY App Div 2d Dept 2013)).

Upon review of the submitted papers, the Court finds that the Defendants have established prima facie entitlement to summary judgment dismissing the Plaintiff's action. Specifically, the Defendants have established prima facie that the Plaintiff knowingly and voluntarily consented to the Release via an electronic consent as part of her online Application, and that the Plaintiff would not have been able to complete her online Application without checking off on the Release as part of said application. Sharma gave a detailed description of the online volunteer application process for the Parade in both of her affidavits. In particular, Sharma indicated that it was impossible for the Plaintiff, as an applicant, to complete the online Application or even move to the next "section" of the Application without both typing her name on the Release and checking the box confirming that the Plaintiff understood and accepted the full terms of the Release. Sharma also described the entire online application process, including screen shots of every step in the process. The Defendants also attach copies of the first pages of the Plaintiff's Application and the Release. The "Contact Information" section of the Application includes the Plaintiff's name, address and phone numbers, which have been typed into relevant boxes. Similarly, the Release has the Plaintiff's name typed in the name space, and a checked box indicating that the Plaintiff understood and accepted the full terms of the Release.

The Court further notes that in both the attached generic Application and the Plaintiff's Application, the Release appears to be the fifth screen that an applicant sees when filling out the online Application (counting from the login page).¹ The generic Application is fourteen screens long (from the login page to the "Your registration application is now complete" page), with four screens preceding the Release. Prior to getting to the Release screen, the Plaintiff had to fill out other steps/screen, such as

¹ The Court recognizes that the Release screen-shot from the Plaintiff's Application was attached as two pages, while the generic Release screen-shot was attached as one page. However, it is clear that the Release from the Plaintiff's Application was a single screen-shot that the Defendants' attached to their papers as two pages. The Court further notes that all of the screen-shots in the Plaintiff's Application preceding the Release are identical to the pre-Release screen-shots in the generic Application in terms of form and information requested. Further, the Releases in both the Plaintiff's Application and the generic Application were both fifth in the sequence of screen-shots.

the sections entitled "Contact Information", "License Information" and "Costume information". The attached Plaintiff's Application shows that the Plaintiff filled in all of the information required on the screens prior to the Release screen.

In the underlying action, the terms of the Release are clear, unequivocal and reflect the intention of the parties to relieve the Defendants of liability as to the Plaintiff's volunteering at the Macy's

Thanksgiving Day Parade:

By signing below, the undersigned "Participant" confirms that s/he is at least eighteen (18) years of age as of the date signed below or has caused this Release to be signed by a parent or legal guardian, and:

...

Agrees, by executing this Release, to give up and release, on behalf of her/himself, his/her heirs, successors, estate and any and all persons and/or entities, who may seek to represent or assert a claim derived from or through Participant (all such Participant representatives are included within the term "Participant" for all purposes hereunder and, in consideration of being permitted o participate in the Parade, further agrees to be solely responsible for any and all harm that may occur, relate to or result from his/her participation in the Parade and/or any or all related activities, including, but not limited to, any harm occurring prior to or after the Parade, which are included in the term "Parade" for purposes of this Release, as well as all risk of harm to Participant's person and property

Expressly releases and forever discharges the Macy's Parade and Entertainment Group, a Division of Macy's Corporate Services, Inc. and its affiliates which, consist of Macy's Inc. and all of its direct and indirect subsidiaries, together with each of their respective principals, officers, directors, shareholders, agents, insurers, employees, successors and assigns (collectively included within the term "Macy's"), from all claims and causes of actions that Participant may have or claim to have, at any time against Macy's, of any kind whatsoever, all to the fullest extent permitted by law, whether or not based on negligence or wrongful conduct, as may arise out of, relate to, or allegedly arise out of or be related to the Parade of participation therein.

Releases any right to sue any of the above Macy's parties, agrees to be solely liable for all costs and expenses s/he may incur by reason of the Parade, regardless of whether related to an injury to the Participant, to another person or to any property, whether of the Participants or of another person or entity.

...

Acknowledges having read this Release and confirms that s/he understands and accepts these terms and agrees to comply with them in full.

Further, the language next to the check-box specifically reads that “[b]y checking this box and submitting my application, I confirm that I understand and accept the terms in full”

Upon review of the terms of the Release, the Court does not find that the Release purports to grant exemption from liability for willful or grossly negligent acts nor is there any overriding public interest demanding that the release be rendered ineffectual. Specifically, the terms of the Release are limited to the Plaintiff’s participation in the parade and there is nothing in the language of the release to indicate that it was intended to encompass willful or grossly negligent acts. Further, there is nothing about the Release to suggest that it stands counter to any public interest.

In addition, the Court finds that the Defendants’ arguments as to the nature of the online application are supported by both the Plaintiff’s deposition and the deposition taken of Susan Tercero for the Defendants Macy’s Inc. The Plaintiff testified at her deposition in sum and substance that she filled out an application to volunteer at the Parade from a “link” on an email. The Defendants also attached with their moving papers the deposition transcript of Susan Tercero, who testified that she is vice president of event operations for the Macy’s Parade and Entertainment Group. Tercero gave a detailed description of the online application process for people wishing to volunteer at the parade, including the safety release form. Specifically Tercero testified that the Release used an electronic “sign off” system where the applicant had to check off a box indicating that they agreed to the term of the Release.

The Court finds that said deposition testimonies support the Defendants’ arguments for summary judgment. Specifically, the Plaintiff confirmed that she filled out an online application to volunteer for the Parade, and Tercero’s description of the Release confirms Sharma’s description of the Release as described in Sharma’s affidavit. Taken together with Sharma’s affidavit, the Defendants have established prima facie that the Plaintiff completed her Application, which necessarily required that the Plaintiff type her name on and check off on the Release included therein.

Further, as the Plaintiff is presumed to have read the Release prior to checking the box indicating that she understood and accepted the terms of the Release, the Court finds that the Defendants have established prima facie that the Plaintiff knowingly and voluntarily agreed to the terms of the Release.

The Court further finds that the Defendants have established prima facie that the Release also applied to the Defendant Stanton, who was acting as an agent of Macy's Inc. at the time of the accident. "A principal-agent relationship may be established by evidence of the 'consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act', even where the agent is acting as a volunteer" (5015 Art Fin. Ptnrs, LLC v Christie's, Inc., 58 AD3d 469, 471 (NY App Div 1st Dept 2009) citing Fils-Aime v Ryder TRS, Inc., 40 AD3d 917 (NY App Div 2d Dept 2007); see also Paterno v Strimling, 107 AD3d 1233 (NY App Div 3d Dept 2013)). The Court recognizes that the Defendants acknowledge that Stanton was an agent of Macy's, Inc., acting under Macy's direction and serving Macy's interests in his capacity as a volunteer at the Parade. The Court further recognizes that all of the Defendants, including Stanton, are being represented by the same counsel. The Court finds that the Defendants have established prima facie that Stanton was an agent of Macy's Inc. at the time of the accident and, as such, falls within the scope of the Release.

The Court further finds that the Plaintiff has failed to establish any issues of fact in opposition to summary judgment. Specifically, the Plaintiff has failed to create an issue of fact as to whether or not she electronically "signed off" on the Release as part of her online application process. The Court finds that the Plaintiff's self-serving statements in her affidavit that she did not check the box at the bottom of the Release and that she did not knowingly and voluntarily waive any rights are insufficient to create an issue of fact. Similarly, the Plaintiff's testimony that she did not recall checking the box at the bottom of the Release is also insufficient to create an issue of fact on this point. In particular, the Plaintiff has not presented any proof that she would have been able to complete and/or submit the online Application

without checking off the box at the bottom of the Release indicating that she understood and agreed to the terms of the release.

Further, the Plaintiff does not dispute that she filled out the sections of her Application that were presented in the screens prior to the Release. Specifically, with the exception of the Release screen, the Plaintiff does not in any way challenge the accuracy of the part of her Application that the Defendants attached with their supplemental affirmation. The facts that the Plaintiff does not dispute that she filled out all of the parts of the Application that came immediately before the Release, was able to submit said Application and was ultimately picked as a volunteer for the Parade, strongly supports the Defendants' argument that the Plaintiff filled out the Application in its entirety including electronically consenting to the Release.

The terms of the Release were clear and unambiguous, as was the indication next to the check box that by checking the box the Plaintiff confirmed that she understood and accepted those terms. By checking the box at the bottom of the Release the Plaintiff is presumed to have read the Release and accepted its terms (See Blog v. Battery Park City Auth., 234 A.D.2d 99, 101 (NY App Div 1st Dept 1996); See also Hines v City of New York, 2016 NY Slip Op 30504(U) (NY Sup Ct Mar 24, 2016)).

Finally, although the Plaintiff argues that the Defendant Stanton was not an employee of Macy's, the Plaintiff has failed to create an issue of fact to challenge the Defendants' argument that Stanton was an agent of Macy's Inc., in his capacity as a volunteer at the parade.

Conclusion


Accordingly and for the reasons so stated, it is hereby

ORDERED that the Defendants' motion for summary judgment dismissing the Plaintiff's action granted, and the underlying action is dismissed in its entirety.

The foregoing constitutes the JUDGMENT and DECISION of the Court.

Dated: Sept 9, 2016

ENTER:

 , JSC
HON. ROBERT D. KALISH
J.S.C.