

1995 WL 322148  
United States District Court,  
S.D. New York.

Sydna Ann SPANCAKE, Plaintiff,  
v.  
AGGRESSOR FLEET LIMITED  
and Belize Aggressor, Defendants.

No. 91 CIV. 5628 (DLC).

I  
May 26, 1995.

#### Attorneys and Law Firms

[James Robert Fauci](#), James Robert Fauci, P.C. and Associates,  
New York City, for plaintiff.

[Herbert B. Halberg](#), Beck & Halberg, New York City, for  
defendant Aggressor Fleet Ltd.

#### OPINION & ORDER

[COTE](#), District Judge:

\*1 Plaintiff, who sustained injuries to her hand during a scuba diving vacation on board the Belize Aggressor, brings this negligence action against defendant Aggressor Fleet Limited (“Aggressor Fleet”). Before the Court is Aggressor Fleet’s motion to dismiss the complaint.

#### BACKGROUND

The undisputed facts are as follows. The plaintiff, Sydna Ann Spancake, is a scuba diving enthusiast, holding an Advanced Open Water certification. On approximately October 18, 1988, Spancake approached Aggressor Fleet about a scuba diving vacation on board the M/V Belize Aggressor, departing from Belize on or about December 3, 1988. Spancake filled out an application, which she submitted to Aggressor Fleet. The reverse side of this application contained a “Release, Liability, Responsibility and Indemnity Agreement” (the “Release Agreement”), signed by Spancake.

Aggressor Fleet reserved a space on the Belize Aggressor and made all the necessary arrangements for Spancake’s trip. Upon boarding the Belize Aggressor on December 3, 1988,

Spancake signed a “Waiver and Indemnity Agreement” (the “Waiver Agreement”), waiving various causes of action against the Belize Aggressor. While on board the diving boat, on approximately December 8, 1988, Spancake participated in a “fish feed”, in which divers hand fed fish while being videotaped. While Spancake was in the water feeding the fish, a barracuda bit her hand, causing severe injury.

Spancake filed this action on August 20, 1991, alleging that various acts of negligence onboard the Belize Aggressor caused the injuries to her hand. Aggressor Fleet argues in its motion to dismiss that it is not the proper party: it has no corporate relationship with the Belize Aggressor, for which it acts merely as a travel agent. Further, Aggressor Fleet argues that the Release Agreement establishes that it is not liable for any negligent acts taking place while plaintiff was under the supervision and control of Belize Aggressor’s employees. Spancake responds that Aggressor Fleet held itself out, and in fact operated, as the owner of the Belize Aggressor and should therefore not be permitted to contract itself out of its own acts of negligence.

Aggressor Fleet moved to dismiss this action once before, on November 16, 1992. This motion was denied by the Honorable Pierre N. Leval, to whom this action was then assigned, in an Order dated July 19, 1993. In this order, Judge Leval held that “the complaint states a cause of action on its face, regardless whether plaintiff will be able to prove it.”

#### STANDARD

The first question for the Court is whether this motion should be more appropriately characterized as a motion for summary judgment. Although defendant has moved to dismiss the action pursuant to [Rule 12\(b\)\(6\), Fed.R.Civ.P.](#), a court can convert a motion to dismiss into a motion for summary judgment under particular circumstances. [Rule 12\(c\), Fed.R.Civ.P.](#), provides

If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to

present all material made pertinent to such a motion by Rule 56.

\*2 The inquiry, when determining if a conversion to a motion for summary judgment is appropriate, is whether the non-movant,

should reasonably have recognized the possibility that the motion might be converted into one for summary judgment or was taken by surprise and deprived of a reasonable opportunity to meet facts outside the pleadings.

*National Ass'n of Pharmaceutical Mfrs. v. Ayerst Lab.*, 850 F.2d 904, 911 (2d Cir. 1988) (quoting *In re G. & A. Books, Inc.*, 770 F.2d 288, 295 (2d Cir. 1985), cert. denied, 475 U.S. 1015 (1986)). See also *Krijn v. Pogue Simone Real Estate Co.*, 896 F.2d 687, 689 (2d Cir. 1990).

In this case, matters outside the pleadings were presented by both parties. Defendant attached to its motion the Release and Indemnity agreements, excerpts from deposition testimony, an affidavit, and copies of checks. Plaintiff in turn attached various advertisements, excerpts from deposition testimony, and a copy of an insurance policy, thereby eliminating any possible claim of surprise. Further, neither party indicates the need for further discovery on the matter at issue here.<sup>1</sup> These submissions, combined with Judge Leval's prior ruling that the complaint is valid on its face, make it more appropriate for this Court to treat the current motion as a motion for summary judgment. The motion to dismiss will therefore be converted to a motion for summary judgment.

Summary judgment is only appropriate when the submissions of the parties, taken together, “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), Fed.R.Civ.P. When deciding a motion for summary judgment, a court must “view the evidence in a light most favorable to the non-moving party and draw all reasonable inferences in its favor.” *American Casualty Co. of Reading, PA v. Nordic Leasing, Inc.*, 42 F.3d 725, 728 (2d Cir. 1994).

The moving party bears the burden of “informing the court of the basis for its motion,” and identifying those portions of the pleadings and other submissions which it believes demonstrate the absence of a genuine issue of material fact.

*Fed'l Deposit Ins. Corp. v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

When the moving party has met its burden under Rule 56(c) of the Federal Rules of Civil Procedure, however, a non-moving party “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party must “set forth specific facts showing that there is a genuine issue for trial,” and cannot rest on “mere allegations or denials” of the facts asserted

by the movant. Rule 56(e), Fed.R.Civ.P.; accord *Rexnord Holdings, Inc. v. Biderman*, 21 F.3d 522, 525-26 (2d Cir. 1994). A “bald assertion” that is completely unsupported by evidence is not sufficient to overcome a motion for summary judgment. *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991). If no rational fact finder could find in the non-movant's favor, there is no genuine issue of material fact, and summary judgment is appropriate. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

## DISCUSSION

### The Release Agreement

\*3 Aggressor Fleet contends that the Release Agreement is a complete defense to Spancake's claim for personal injuries arising out of the negligence of the Belize Aggressor.

The Release Agreement bears the capitalized title “Release, Liability, Responsibility and Indemnity Agreement,” and is signed by Spancake. It provides in relevant part that

*Aggressor Fleet Limited does not, by acceptance of this applicant, assume any responsibility or liability for the safety, freedom from accident or injury or well-being of any participating individual, particularly while such individual is engaged in underwater activities, whether alone or in groups, under the supervision of tour escort, crewman/diver from the vessel, or otherwise.... [T] he applicant ... waive[s], release[s] and absolve[s] Aggressor Fleet Limited, the owners, charterers and operators of the*

Vessel, their agents and employees and the Vessel, ... *from any and all damages resulting from death or personal injuries ... which any applicant or participant may sustain on account of, arising out of, or in connection with said program, whether resulting from ... negligence of anyone in charge of or participating in said program, or from the ownership, maintenance, use, operation, repair, safety, or control of any ... ship, boat, ... [or] diving equipment that may be provided, or otherwise. Applicants and participants agree to fully protect, defend, and indemnify Aggressor Fleet Limited, and the owners, operators and charterers of the Vessel and their agents, employees, and vessels, from and against any claims arising out of the foregoing activities or the use of any vessel or equipment, even if such claims arise out of the sole negligence or fault of Aggressor Fleet Limited, and/or the owners, operators and charterers of the Vessel, and their agents, employees and vessels, the unseaworthiness or defect of any vessel or equipment....*

(Emphasis supplied.)

This language clearly establishes that Aggressor Fleet did not intend to assume any liability for the negligent acts of third parties, and plaintiff does not dispute this. Plaintiff's argument instead focusses on its claim that Aggressor Fleet either held itself out as, or in fact was, the owner and operator of the Belize Aggressor. From this, plaintiff argues that the Release Agreement is an "unconscionable" attempt to release Aggressor Fleet from liability for its own negligence.

Spancake correctly identifies the suspicion with which courts view contracts intended to exculpate a party from its own negligent acts. It is well settled that "the law frowns upon" these agreements. *Gross v. Sweet*, 49 N.Y.2d 102, 106 (1979), citing *Van Dyke Productions, Inc. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 304 (1963). Exculpatory provisions are, however, enforceable, with certain exceptions, when they survive the "close judicial scrutiny" to which courts subject them. *Id.* To be enforceable, exculpatory language must be unambiguously so: it must "plainly and precisely [provide] that the 'limitation of liability extends to negligence or other fault of the party attempting to shed his ordinary responsibility.'" *Id.* at 107 (quoting *Howard v. Handler Bros. & Winell*, 279 A.D. 72, 75-76, *aff'd* 303 N.Y. 990 (1951)). Although courts do not necessarily require that the word "negligence" be used, there must be "words conveying a similar import". *Id.* An exculpatory clause can also be viewed as void "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 N.Y.2d 95, 100 (1991).

\*4 The language of the Release Agreement is unambiguous. It releases both Aggressor Fleet and "the owners, operators and charterers of the Vessel" from liability from, *inter alia*, injury due to "the sole negligence" of Aggressor Fleet or the owners, operators and charterers of the Belize Aggressor. The Release Agreement is sufficiently clear to release Aggressor Fleet not only from liability for the negligence of third parties, but also for its own negligence, if any. See *Lago*, 78 N.Y.2d 95 (complaint brought by survivors of race car mechanic killed while working on race track's infield dismissed due to release signed by mechanic). Accordingly, even if, as plaintiff claims, Aggressor Fleet either held itself out to be, or was in fact, the owner and operator of the Belize Aggressor, the Release Agreement acts to bar plaintiff's claims.

There is no "special relationship" between plaintiff and Aggressor Fleet such that public interest demands the exculpatory language be invalidated. See *Id.* at 99. Plaintiff does not dispute this, but, in apparent confusion over whose relationship should be scrutinized for this test, argues only that a "special legal relationship does exist between the parties in question and therefore the release is invalid. Aggressor Fleet and Belize Aggressor are in fact one and the same." Opposition at 6. It is the relationship between the plaintiff and defendants which must, because of its "special" nature, exempt the plaintiff from the otherwise controlling language. Plaintiff alleges no such relationship.

Summary judgment is therefore granted in favor of the defendant, Aggressor Fleet.

#### THE BELIZE AGGRESSOR

Although the Belize Aggressor was named as a defendant in this action, it was never served. Plaintiff has represented that this was due to its inability to attain jurisdiction over this defendant. Accordingly, the Belize Aggressor is dismissed as a defendant in this action.

#### CONCLUSION

Aggressor Fleet's motion for summary judgment is granted in full, and the action is dismissed as against the Belize Aggressor.

**All Citations**

Not Reported in F.Supp., 1995 WL 322148, 1996 A.M.C. 1673

SO ORDERED:

**Footnotes**

- 1 Aggressor Fleet argues in its papers that “[p]laintiff has been afforded ample opportunity through discovery for exploration of any possible interlocking relationships between Aggressor Fleet and the Belize Aggressor.” Memorandum of Law in Support of Motion to Dismiss at 10. Plaintiff does not dispute this in any of its papers.