CASENOTE: GYM WAS PROVIDER OF SERVICES BARRING CLAIM FOR STRICT PRODUCT LIABILITY CLAIM FOR INJURIES WHILE WORKING OUT IN GYM BARRED BY ASSUMPTION OF RISK

LAWATYOURFINGERTIPS ®
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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

EGNACIO BALINTON,
Plaintiff and Appellant,
v.
24 HOUR FITNESS USA, INC.,
Defendant and Respondent.

A140576

(San Francisco County
Super. Ct. No. CGC-12-518512)

Plaintiff Egnacio Balinton was injured while using a hack squat exercise machine at defendant 24 Hour Fitness USA, Inc.'s ("24 Hour") facility on Bay Street in San Francisco. He appeals from the judgment entered after the trial court granted 24 Hour's motion for summary judgment, arguing that (1) his products liability claims were not barred

because 24 Hour is a provider of products and not fitness services, and (2) his negligence claims were not barred by the doctrine of primary assumption of the risk. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent 24 Hour operates various fitness facilities for its members throughout the Bay Area. These facilities offer various services and amenities, including: (1) "free weight" areas containing free weight exercise equipment from various manufacturers; (2) group exercise classes, including aerobics, dance classes, and yoga; (3) cardiovascular conditioning machines, including stair climbers, treadmills, and stationary bicycles; (4) individualized personal training programs with certified personal trainers (for an additional fee); and (5) men's and women's locker rooms. Certain facilities offer additional services and amenities such as basketball courts, volleyball courts, swimming pools, steam, sauna, whirlpool and tanning facilities, and juice bars.

Appellant Egnacio Balinton began using 24 Hour's facilities in the Bay Area in 1994. At that time, Balinton was in a relationship with Patricia Vandebogart, an employee of 24 Hour. Vandebogart obtained a membership with 24 Hour for Balinton. Balinton was responsible for paying the monthly membership dues. Balinton exercised frequently at several 24 Hour facilities between September of 2003 and August 6, 2011.

On August 6, 2011, Balinton was using a "hack squat" exercise machine manufactured by BodyMasters Sports Industries, Inc. ("BodyMasters") at 24 Hour's North Beach facility in San Francisco. The machine strengthens the quadriceps muscle in the user's front thigh. The user lies on his or her back at a 45-degree angle in a slightly squatted position, with weights positioned on a bar attached to pads resting on the user's shoulders. The user then disengages a catch and performs squats by raising and lowering his or her legs to push the weight apparatus up and down on a stationary runner.

At the time of Balinton's injury, the North Beach facility had two hack squat machines, one manufactured by Flex Fitness and one by BodyMasters. The Flex Fitness hack squat machine was equipped with a "safety break," which is a metal nub welded to

the back runner in order to prevent the weight apparatus from descending all the way to the bottom of the frame in the event that the user is unable to return the weight apparatus to its starting position. The BodyMasters hack squat machine that Balinton was using did not have a safety break. While performing a set of exercises using the BodyMasters machine, Balinton's legs became fatigued and he was not able to return the weight to its starting position. The weight then descended "too low," forcing Balinton into a "crunched position" and injuring him.

Balinton filed suit against BodyMasters, 24 Hour, and affiliated entities, alleging three products liability claims under negligence, warranty, and strict liability theories as well as two claims for negligence and premises liability. 24 Hour answered and ultimately moved for summary judgment. In support of its motion, 24 Hour introduced a membership agreement purportedly signed by Balinton, containing an express agreement that 24 Hour "will not be liable for any injury . . . resulting from the negligence or other acts of [24 Hour] or anyone using the Facilities." Balinton denied having signed the agreement and objected to its introduction. The trial court granted 24 Hour's motion, finding that the hack squat machine at issue was not defective, that Balinton's products liability claims failed as a matter of law because 24 Hour was a provider of services and not of products, and that Balinton's negligence and premises liability claims were barred by the doctrine of primary assumption of the risk. Balinton appeals.

DISCUSSION

I. *Standard of Reviewing*

We review the trial court's decision to grant 24 Hour's motion for summary judgment de novo. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) Summary judgment must be granted if all the papers and affidavits submitted, together with "all inferences reasonably deducible from the evidence" and uncontradicted by other inferences or evidence, show "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Where,

as here, the defendant is the moving party, he or she may meet the burden of showing a cause of action has no merit by proving one or more elements of the cause of action cannot be established. (See *id*., subd. (o).) Once the defendant has met that burden, the burden shifts to the plaintiff to show the existence of a triable issue of material fact as to that cause of action. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 583.) We must consider all evidence in the light most favorable to the nonmoving party. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

II. *Balinton's Products Liability Claims Fail Because 24 Hour is a Service Provider*

Balinton argues that the trial court erred in finding that his products liability claims fail on the grounds that 24 Hour is a provider of fitness services, because Balinton did not use any of those services and instead only sought access to 24 Hour's free weight machines. 24 Hour argues that it did not design or manufacture the hack squat machine at issue, that it provides fitness services generally to its members, and that Balinton's subjective expectations regarding its services are not relevant under *Ontiveros v. 24 Hour Fitness USA, Inc.* (2008) 169 Cal.App.4th 424 (*Ontiveros*). We agree with 24 Hour.

Strict products liability originally applied only to manufacturers of defective products. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62.) The doctrine has since been expanded in California to reach even to those who are mere conduits in distributing the product to the consumer. (See, e.g., *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256, 262-263; *McClaflin v. Bayshore Equipment Rental Co.* (1969) 274 Cal.App.2d 446, 452-453.) The doctrine now reaches "nonmanufacturing parties, outside the vertical chain of distribution of a product, which play an integral role in the 'producing and marketing enterprise' of a defective product and profit from placing the product into the stream of commerce. [Citations.]" (*Bay Summit Community Assn. v. Shell Oil Co.* (1996) 51 Cal.App.4th 762, 773.) However, the doctrine does not apply to transactions "whose primary objective is obtaining services," or to situations where "the transac-

tion service aspect predominates and any product sale is incidental to the provision of the service." (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 344.)

In *Ontiveros*, the plaintiff was injured while using a stair step machine and brought products liability claims against 24 Hour. (*Ontiveros*, *supra*, 169 Cal.App.4th at pp. 426-428.) The trial court granted summary judgment to 24 Hour on the ground that it did not design or manufacture exercise equipment and was a provider of "recreational services." (*Id*. at pp. 428-429.) On appeal, the plaintiff argued that she had purchased her membership for the sole purpose of using 24 Hour's exercise equipment, and that she did not need or receive any services, so that as to her 24 Hour was acting as a provider of a product. (*Id*. at pp. 429-430.) The court relied on the fact that plaintiff's membership agreement entitled her to various fitness services and the "undisputed evidence . . . that defendant provided more to members than just the use of exercise machines" to conclude that "defendant was in the business of providing fitness services and made exercise machines available to members as an incident to those services." (*Id*. at p. 434.)

Balinton argues that *Ontiveros* is distinguishable because he, unlike the plaintiff in *Ontiveros*, never signed a membership agreement, and the *Ontiveros* court relied on the terms of the plaintiff's agreement to conclude that 24 Hour was providing fitness services.[1] (See, e.g., *Ontiveros*, *supra*, 169 Cal.App.4th at p. 434 ["the dominant purpose of

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[1] Balinton objected to the introduction of the alleged membership agreement on various grounds, and the parties dispute whether that agreement was properly admitted. The trial court did not explicitly rule on Balinton's evidentiary objections, so we presume that they were overruled and that the trial court considered the agreement in ruling on the merits of 24 Hour's summary judgment motion. (See *Reid v. Google, Inc.* (2010) 50 Cal. 4th 512, 534.) We need not resolve whether the alleged membership agreement was improperly admitted, because even if it was, there is an issue of fact regarding whether Balinton was bound by its terms given his testimony that he had never signed or even seen the agreement and that he did not authorize Vandebogart or anyone else to sign it on his behalf. In any event, we will conclude that the record supports summary judgment for 24 Hour even without the alleged agreement. (See *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852.)

plaintiff's membership agreement was to provide fitness services"]; *id*. ["it is the terms of her agreement, rather than her subjective intentions, that define the dominant purpose of her transaction with defendant"].) We reject Balinton's constrained reading of the holding in *Ontiveros*. The *Ontiveros* court also relied on the undisputed facts, provided by 24 Hour's risk management analyst, that plaintiff's membership itself entitled her to various services, including aerobics, dance classes, yoga, and other activities to reach its conclusion. (*Id*. at pp. 426-427, 434.) Here, as in *Ontiveros*, the undisputed facts in the record before us establish that 24 Hour offers various services to its members, including group exercise classes, personal training, and other activities. Although Balinton's brief asserts that he "made clear . . . that he was only interested in utilizing the exercise machines," he points to no facts to indicate that he communicated that interest to 24 Hour, nor any facts reflecting the mutual intent of the parties to exclude fitness services from the scope of his membership. In fact, the *Ontiveros* court expressly rejected the argument that Balinton makes here to wit; "that he made clear . . . that he was only interested in utilizing the exercise machines," finding "uncommunicated subjective intent" regarding the scope of the plaintiff's membership to be irrelevant. (*Ontiveros*, *supra*, 169 Cal.App.4th at p. 434.)

We find further support for our conclusion that 24 Hour is a provider of services in *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631. In *Grebing*, the plaintiff was injured while using a "low row" machine at one of 24 Hour's facilities. (*Id*. at pp. 634-635.) The *Grebing* court affirmed the trial court's grant of summary judgment to 24 Hour on the plaintiff's products liability claim because "the undisputed evidence showed that 24 Hour made the low row machine and other exercise equipment available for use by its members and provided a variety of other fitness services [so that] the dominant purpose of 24 Hour's membership agreement with Grebing was providing fitness services rather than supplying a product." (*Id*. at p. 640.) Like the *Ontiveros* and *Grebing* courts, we conclude that the dominant purpose of Balinton's membership was the

provision of fitness services, and thus his products liability claims fail. (See *id.*; *Ontiveros*, *supra*, 169 Cal.App.4th at p. 434.)

III. *Balinton's Negligence Claims Are Barred By Primary Assumption of the Risk*

The doctrine of primary assumption of the risk bars claims for personal injury where the plaintiff is injured by a risk inherent in a sport or activity itself, but recognizes the duty of defendants "not to act so as to *increase* the risk of injury over that inherent in the activity." (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1154; see *Knight v. Jewett* (1992) 3 Cal.4th 296, 315.) What risks are inherent in an activity and the scope of the defendant's duty are legal questions to be decided by the court. (See *Staten v. Superior Court* (1996) 45 Cal.App.4th 1628, 1632-1633; *Vine v. Bear Valley Ski Co.* (2004) 118 Cal.App.4th 577, 593 fn. 4 ["[O]nce the court has resolved the issue of what the inherent risks are, whether the defendant in fact increased those risks under the circumstances of a particular case may be a question for the jury"].) Balinton argues that 24 Hour increased the risk inherent in exercising with the hack squat machine because it "normally provides" hack squat machines featuring a safety break at other locations. 24 Hour argues that Balinton is really asking it to minimize the risks inherent in physical fitness activity.

We find, on the record before us, that Balinton has not established that 24 Hour violated its duty not to increase the risks inherent in using the hack squat machine. The inherent risk of weightlifting is the risk that the user will become strained or fatigued and will drop the weights or otherwise be unable to complete the exercise properly. (See *Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 471 ["Weight training involves the risk that the weight will be dropped"]; *Rostai v. Neste Enterprises* (2006) 138 Cal.App.4th 326, 334 [nature of fitness training is challenging "plaintiff to perform beyond his level of physical ability and fitness" with inherent risk that challenge "will not always be met"].) It is undisputed that 24 Hour does not design or manufacture the exercise equipment in its facilities, but rather purchases or leases that equipment, including the hack squat machine at issue, from various manufacturers. Balinton also does not allege that 24

Hour was negligent in inspecting or maintaining the hack squat machine, or even that the machine did not function as intended. Instead, Balinton argues that 24 Hour increased the risk that he would be injured by providing hack squat machines with "safety breaks" at its other locations, and thereby "set a trap" for Balinton to injure himself by causing him to expect a safety break on the machine at the North Beach location. However, in considering whether primary assumption of the risk applies, the "plaintiff's subjective awareness or expectation" is not relevant. (*Cann v. Stefanec*, *supra*, 217 Cal.App.4th at p. 471; *Cheong v. Antablin* (1997) 16 Cal.4th 1063, 1068.) Balinton has placed nothing in the record before us to suggest that the safety breaks were required by law or regulation, expected by ordinary consumers, or part of any industry standard. Accordingly, he has failed to create an issue of material fact as to whether 24 Hour violated its duty not to increase the risk inherent in weightlifting, and the trial court properly concluded that the doctrine of primary assumption of the risk bars his negligence based claims.

DISPOSITION

The judgment is affirmed.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.