IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CIRCUIT CIVIL DIVISION

HEATHER BENNETT,
Plaintiff,

v. **CASE NO.: 18-CA-009029**
DIVISION: C

SEAWORLD PARKS & ENTERTAINMENT LLC d/b/a BUSCH GARDENS,
Defendant.
_____/

ORDER GRANTING DEFENDANT SEAWORLD PARKS & ENTERTAINMENT LLC'S RENEWED MOTION FOR FINAL SUMMARY JUDGMENT AND ENTERING FINAL SUMMARY JUDGMENT IN FAVOR OF SEAWORLD PARKS & ENTERTAINMENT, LLC

THIS CAUSE came before the Court for hearing on June 29, 2022, on Defendant SeaWorld Parks & Entertainment LLC's *Renewed Motion for Final Summary Judgment*, filed April 28, 2022. On June 9, 2022, Plaintiff filed a *Response in Opposition* as well as a *Cross-Motion for Partial Summary Judgment*. Only Defendant's Motion was set for hearing.[1] Having reviewed the Motion and Response, as well as the summary judgment evidence, and having heard argument of counsel and being otherwise fully advised in the premises, it is **ORDERED AND ADJUDGED** as follows:

[1] The Court notes that although Plaintiff's Cross-Motion was not set for hearing, the Court allowed Plaintiff to present its arguments therein. Plaintiff did not contend that it needed additional time to present its arguments nor seek a delay in the Court's ruling so that its Cross-Motion could be set for hearing. The Court finds no further argument is necessary as to the arguments presented in Plaintiff's Cross-Motion. With respect to the argument that the Release, Waiver, Acknowledgment of Risk and Indemnification Agreement ("Liability Waiver") is ambiguous, the Court notes that Judge Elizabeth Rice already found the Liability Waiver to be clear and unambiguous. No request for rehearing or reconsideration of that ruling was filed. The Court finds no basis to reconsider Judge Rice's ruling and to the extent necessary, affirmatively adopts her ruling herein, and agrees that the Liability Waiver is unambiguous, as explained in more detail below.

1. Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fla. R. Civ. P. 1.510 (2021). "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004). The test for determining whether a genuine dispute as to a material fact exists is whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "All reasonable doubts about the facts should be resolved in favor of the non-movant." *Clemons v. Doughterty Cnty., Ga.*, 684 F.2d 1365, 1369 (11th Cir. 1982). The trial court "may not weigh the evidence or find facts" and "is limited to deciding whether there is sufficient evidence upon which a reasonable juror could find for the non-moving party." *Morrison v. Amway Corp.*, 323 F.3d 920, 925 (11th Cir. 2003). Nor may a trial court make credibility choices between competing views of the evidence. *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 934 (11th Cir. 1987).

"The burden on the moving party may be discharged by 'showing'—that is, point[ing] out to the court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also Bedford v. Doe*, 880 F.3d 993, 996-97 (8th Cir. 2018) (stating that "[i]f the nonmoving party must prove *X* to prevail [at trial], the moving party at summary judgment can either produce evidence that *X* is not so or point out that the nonmoving party lacks the evidence to prove *X*."). Notably, "[a] movant for summary judgment need not set forth evidence when the nonmovant bears the burden of persuasion at trial." *Wease v. Ocwen Loan Servicing, L.L.C.*, 915 F.3d 987, 997 (5th Cir. 2019). "The party opposing the motion for summary judgment may not simply rest upon mere allegations or denials of the pleadings; the non-moving party must establish the essential elements of its case on which it will bear the burden

of proof at trial." *Mousa v. Lauda Air Luftfahrt, A.G.*, 258 F.Supp.2d 1329, 1333-34 (S.D. Fla. 2003) (citing *Celotex* and *Matsushita*). Indeed, a party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "A jury must be able reasonably to find for the nonmovant." *Mousa,* 258 F.Supp.2d at 1334 (citing *Anderson*). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. at 249-50 (citations omitted). After "adequate time for discovery" and upon motion, summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322.

2. The Court first finds that California law applies to the interpretation and enforceability of the Release, Waiver, Acknowledgment of Risk and Indemnification Agreement ("Liability Waiver") signed by Plaintiff.[2]

3. This Court finds that the Liability Waiver is unambiguous as a matter of law for the following reasons:

A. The released parties included any agents and volunteers of Rescue 3 and all other persons or entities acting in any capacity on Rescue 3's behalf. Liability Waiver at p. 1, in the record as Exhibit B to Busch Gardens' Motion.[3]

[2] Even so, the parties agreed that Florida law and California law is virtually identical on the underlying issue of agency and therefore, the choice of law provision in effect has no material impact on the substantive ruling herein.

[3] For ease of reference in this Order, the Court will refer to SeaWorld Parks & Entertainment LLC as "Busch Gardens."

B. Plaintiff acknowledged she was releasing "any causes of action which may be in any way connected with [her] participation in this rescue training activity or the use of … equipment or facilities." Liability Waiver at p. 2, ¶ 1.

4. The Liability Waiver is not contrary to public policy because Plaintiff's participation in the training course was voluntary. Plaintiff could continue to be part of the Technical Rescue Team if she did not participate in the course. Bennett Depo. Vol. 1 at 42:18 – 44:2 in the record as Exhibit B to Busch Gardens' Motion.

5. This Court finds that an agency relationship existed between Busch Gardens and Rescue 3 for the following reasons:

A. Busch Gardens was closed at the time of the Rescue 3 training course in which Plaintiff participated. Bennett Depo. Vol. 1 at 88:18 – 89:7 (Exhibit G to Busch Gardens' Motion); Hogue Depo. at 60:2 – 61:1-3 (Exhibit H); Billig Depo. at 83:8 – 84:6 (Exhibit I); Briganti Depo. at 58:9-25 (Exhibit J); Bayes Depo. at 54:12-16 (Exhibit K); Fazekas Depo. at 67:22-24 (Exhibit L); Pauley Depo. at 44:16-19 (Exhibit M).

B. Rescue 3 was in charge of the training course. Bennett Depo. at 84:22 – 85:7 (Exhibit Q).

C. Busch Gardens' role in the training course was allowing Rescue 3 to use the facilities for the training, making employees available to turn on the water flow for Congo River Rapids and having employees sit at positions along the ride course to be available to press the emergency stop button if necessary. Hogue Depo. at 62:18 – 64:1 (Exhibit C); Hogue Depo. at 68:4-19 (Exhibit D); Billig Depo. at 89:17 – 92:1 (Exhibit E); Billig Depo. at 143:2-20 (Exhibit R).

D. Busch Gardens' employees were on site at the time of the accident for the purpose of Rescue 3's training course and reported earlier than their normal shift times. Conlon Depo. at 63:1-6 filed by Plaintiff on June 9, 2022; Vazquez Depo. at 20:4-25 filed by Plaintiff on June 9, 2022; Soltis Depo. at 40:14-21 filed by Plaintiff on June 9, 2022.

E. Busch Gardens' employees were not acting according to Busch Gardens' Standard Operating Procedure for the ride at the time of the training because no rafts were in use and the course participants were permitted to enter the flowing water. Conlon Depo. at 55:4-22, 64:11-21 filed by Plaintiff on June 9, 2022.

F. Under California law, "[t]he existence of an agency relationship is usually a question of fact, *unless the evidence is susceptible of but a single inference*." *Harley-Davidson, Inc. v. Franchise Tax Bd.*, 237 Cal. App. 4th 193, 214 (2015) (emphasis in original) (citation omitted).

G. There is no genuine dispute as to any material fact set out above. Plaintiff's summary judgment evidence is insufficient to allow a reasonable jury to find in her favor on her claim against Busch Gardens.

6. This Court finds Busch Gardens was a volunteer of Rescue 3 for the following reasons:

A. Busch Gardens gratuitously allowed Rescue 3 to use its facilities as a location for the training course in which Plaintiff participated. Hogue Depo. at 62:18 – 64:1 (Exhibit C to Busch Gardens' Motion); Billig Depo. at 53:5-125 (Exhibit S).

B. Busch Gardens gratuitously provided employees to turn on the water flow to the Congo River Rapids ride and to press the emergency stop button if needed during the training. Hogue Depo. at 62:18 – 64:1 (Exhibit C); Billig Depo. at 53:5-17 (Exhibit S).

C. There is no genuine dispute as to any material fact set out above. Plaintiff's summary judgment evidence is insufficient to allow a reasonable jury to find in her favor on her claim against Busch Gardens.

7. Accordingly, Busch Gardens is entitled to enforce the Liability Waiver signed by Plaintiff because Busch Gardens was an agent and volunteer of Rescue 3.

8. In addition, Busch Gardens did not breach any duty owed to Plaintiff for the following reasons:

A. At the time of the accident, Plaintiff was in the water in the Congo River Rapids, not as a patron riding in a raft as the ride was normally used. Conlon Depo. at 55:4-22 filed by Plaintiff on June 9, 2022.

B. Before any of the Rescue 3 course participants entered the water, they walked the ride course without water and observed where the underwater obstacles were located and what would be underneath the water. Billig Depo. at 92:2-16 (Exhibit E to Busch Garden's Motion); Bennett Depo at 48:10 – 51:14 (Exhibit T);

C. The water was flowing before any participants entered the water. Billig Depo. at 92:2-16 (Exhibit E).

D. Swimming in the rapidly flowing water was an open and obvious danger in which Plaintiff chose to participate.

E. The "Acknowledgment of Risks" section of the Liability Waiver signed by Plaintiff identified the following specific risks: "water conditions in all bodies of water…contact with debris…natural or manmade objects…collision with objects or people…entanglement with equipment."

F. Because there is no duty to warn Plaintiff of open and obvious risks and, in any event, Plaintiff was warned of exactly the risks she now complains caused her injury, Busch Gardens did not breach any duty to Plaintiff.

G. There is no genuine dispute as to any material fact set out above. Plaintiff's summary judgment evidence is insufficient to allow a reasonable jury to find in her favor on her claim against Busch Gardens.

9. For the above reasons, Defendant SeaWorld Parks & Entertainment LLC's *Renewed Motion for Final Summary Judgment* is hereby **GRANTED**. Final summary judgment is therefore entered in favor of Defendant, SeaWorld Parks & Entertainment LLC, and against Plaintiff, Heather Bennett. Plaintiff shall take nothing from Defendant. Defendant shall go hence without day. The Court reserves jurisdiction to address any ancillary matters.

DONE AND ORDERED and effective as of the date imprinted below with the Judge's signature.

Electronically Conformed 7/15/2022
Melissa Polo

MELISSA M. POLO,
Circuit Court Judge

Electronically conformed copies furnished via JAWS to all parties/counsel properly associated to the case or added in JAWS to receive event notifications as of the date of this order.