Giffuni v Centerplate, Inc.
2021 NY Slip Op 31723(U)
May 19, 2021
Supreme Court, Kings County
Docket Number: 509231/14
Judge: Ellen M. Spodek

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of May, 2021.

P R E S E N T:
HON. ELLEN M. SPODEK,

Justice.

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JUSTIN GIFFUNI,

Plaintiff,

- against -

DECISION & ORDER
Index No. 509231/14
Mot. Seq. No. 4

CENTERPLATE, INC., BOSTON CULINARY GROUP, INC., VOLUME SERVICES, INC., SERVICE AMERICA CORP., MARGARETVILLE MEMORIAL HOSPITAL, KENNETH E. ZIGROSSER, RPA-C, and PAUL LLOBET, M.D.,

Defendants.

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SERVICE AMERICA CORP., CENTERPLATE, INC., BOSTON CULINARY GROUP, INC., and VOLUME SERVICES, INC.,

Third-Party Plaintiffs,

-against-

THE KINGSTON HOSPITAL, HEALTH ALLIANCE HOSPITAL BROADWAY CAMPUS, FRANK T. LOMBARDO, M.D. and ORTHOPEDIC ASSOCIATES OF DUTCHESS COUNTY.

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The following e-filed papered read herein:	Papers Numbered
Notice of Motion and Affidavits (Affirmations) Annexed	126, 127, 134 & 136
Opposing Affidavits (Affirmations)_____	138-139
Reply Affidavits (Affirmations/Affidavits)	147-148

Upon the foregoing papers, Defendants/Third-Party Plaintiffs Centerplate, Inc., Boston Culinary Group, Inc., Volume Services, Inc. and Service America Corp.

(collectively, moving defendants) move for an order, pursuant to CPLR 3211 & 3212, granting summary judgment dismissing all claims, cross-claims, and counterclaims as against them.[1]

Background

On the morning of February 1, 2014, plaintiff Justin Giffuni (Mr. Giffuni) arrived at Belleayre Mountain in Highmount, New York (Belleayre) with Danielle Gough, Mike Giffuni, and Nicole Giffuni. Mr. Giffuni brought his own ski boots, helmet, and goggles, but rented skis and poles from the rental shop at Belleayre.[2] The rental shop was operated by Service America Corporation d/b/a Centerplate (Service America Corp.) pursuant to an agreement with the New York State Olympic Regional Development Authority (ORDA).[3] ORDA operated, managed, and maintained Belleayre.

Service America Corp. is a direct and wholly owned subsidiary of non-party Volume Services America Inc. d/b/a Centerplate (Volume Services America). Volume Services America also is the parent company and sole owner of Boston Culinary Group, Inc. d/b/a Centerplate (Boston Culinary Group) and Volume Services, Inc. d/b/a

[1] Included in the initial notice of motion, moving defendants sought additional relief, pursuant to CPLR 3025, to amend their answer. Subsequently, moving defendants filed an amended notice of motion withdrawing this relief. Consequently, such relief is not before this court.

[2] Mr. Giffuni attests that the boots were equipped with customized footbeds.

[3] In 2011, ORDA and Service America Corp. entered into an agreement titled "Concession License Agreement." The Concession Agreement granted Service America Corp, among other rights, the "rights to manage and operate . . . equipment rental[s]" at several facilities operated and maintained by ORDA (NY St Cts Elec Filing [NYSCEF] Doc. No. 136, aff of Brian Walters, exhibit 1, at 6). The parties amended the agreement in October 2013. This subsequent contract entitled "Amendment to Concession License Agreement," provides "[Service America Corp.] shall have the exclusive right to continue to provide . . . services, including the ski rental . . . at Belleayre" (*id.*, exhibit 2, at 1).

Centerplate (Volume Services). Volume Services America, in turn, is a direct and wholly owned subsidiary of Centerplate, Inc.[4]

Upon entering the rental shop, Mr. Giffuni received rental services from Ski Technician Eric Reed (Mr. Reed). Mr. Reed had been hired earlier in the 2013-2014 Winter Season as a Ski Technician.[5] Prior to serving customers as a Ski Technician, Mr. Reed was required and did receive certification to service ski equipment through Rossignol, a non-party entity that provides ski equipment to the rental shop.[6] Mr. Giffuni was presented with a ski rental agreement which he read and completed. He entered the following information on the ski rental agreement: his height (6' 2"), weight (183 lbs), age (30 years), and skier type (advanced).[7] The rental agreement included, among other provisions, the following language:

> "I accept and clearly understand that there are inherent and other risks involved in the sport of skiing and snowboarding, for which this equipment is to be used; that injuries are a common and ordinary occurrence of this sport, and I freely assume those risks.
> . . .
>
> I understand that the ski-boot-binding system which I have rented will not release at all times nor under all circumstances, nor is it possible to predict every situation in

[4] Stated alternatively, Centerplate, Inc. owns and maintains a subsidiary Volume Services America. Volume Services America, in turn, owns and maintains three subsidiaries: a) Service America Corp., b) Boston Culinary Group, and c) Volume Services.

[5] February 1, 2014 is inclusive of the 2013-2014 Winter Season.

[6] The rental shop exclusively offered Rossignol skis at the time of the accident.

[7] The rental agreement specifically identified skier types as I, II, or III. Mr. Giffuni identified his skier type as III, it is undisputed that this indication represents a skier with advanced experience.

> which it will release and it is therefore no guarantee of my safety. Snowboard and snowblades boot binding systems is a non-release system.
>
> . . .
>
> I therefore release Centerplate and its owners, agents and employees from any and all liability for damage and injury to myself or to any person or property resulting from negligence, the selection, adjustment, and use of this equipment accepting myself the full responsibility for any and all such damage or injury of any kind which may result" (NYSCEF Doc. No. 133, affirmation of moving defendants' counsel, exhibit F, at 1).

Mr. Giffuni also advised Mr. Reed that he would use his own ski boots. Mr. Reed offered Mr. Giffuni the choice between regular skis and performance skis. Mr. Giffuni selected performance skis. Mr. Reed retrieved the performance skis, adjusted the binding indicator setting to 6.5 and provided them to Mr. Giffuni.[8] Based upon Mr. Giffuni's height, weight, age, and skier type, the appropriate binding indicator setting is 8, according to the standards promulgated by Rossignol. Mr. Giffuni completed the transaction for the rental skis and also, in the same transaction, purchased a ski lift ticket, permitting him access to Belleayre.

Mr. Giffuni exited the rental shop and placed his boot bindings into his skis. He proceeded to shake the skis to test the bindings. Shortly after, Mr. Giffuni and his companions took a ski lift to an intermediate mid-mountain ski trail to take a test run.

[8] The indicator setting value refers to the amount of torque force required to release the skier's boots from the ski bindings. The higher the indicator setting value the more force required to unbind the boots from the bindings. The taller, heavier, and more experienced the skier is, results in a higher indicator setting compared to a skier who is shorter, lighter, and less experienced.

Mr. Giffuni was able to successfully complete the intermediate test run and come to a safe stop at the conclusion of the run. The group then took the same ski lift to the Mohawk trail, a more advanced ski trail. Mr. Giffuni was the first of his company to embark on the Mohawk trail. As Mr. Giffuni skied down the Mohawk trail he approached a connecting cross-trail at which point he attempted to stop using a maneuver in which he sharply turned his skis to be perpendicular to the slope to cause an abrupt and immediate stop. However, as Mr. Giffuni attempted to stop, his skis became unbounded from his boots resulting in him continuing downhill 30-feet. He then veered off the trail into a tree sustaining injuries predominately to his right leg.

Emergency personnel arrived to assist Mr. Giffuni shortly after his accident. The emergency personnel produced an Accident Report Form, identifying, among other information, that the skis were produced by Rossignol, they were rentals from the rental shop at Belleayre, and that the bindings had released and the ski indicator settings were marked 6 (*see* NYSCEF Doc. No. 143, Raul Guisado aff, exhibit E, at 1).[9] Eventually, Mr. Giffuni was evacuated off the trail by a toboggan, which took him to a lodge at Belleayre. From the lodge, Mr. Giffuni was taken by ambulance to Margaretville Memorial Hospital (Margaretville), specifically the emergency room.[10] He remained at Margaretville until he was transferred to The Kingston Hospital (Kingston). While at

[9] The accident report form denotes "Ski Settings" rather than "indicator settings" as is on the ski rental agreement. It is undisputed that these terms refer to the same item.

[10] Defendants Kenneth E. Zigrosser, RPA-C, and Paul Llobet, M.D. are both medical professionals associated with Margaretville.

Kingston, Mr. Giffuni received various medical treatments including multiple surgeries to address his injuries. Afterwards, Mr. Giffuni continued to receive certain medical treatment, both physical and psychological, as a result of his injuries.[11]

Mr. Giffuni subsequently commenced the instant action, asserting claims for negligence and negligent hiring, supervision, and retention against moving defendants.[12] Moving defendants appeared by way of serving a verified answer with various affirmative defenses and cross-claims against defendants Kenneth E. Zigrosser, RPA-C, Paul Llobet, M.D., and Margaretville seeking indemnification and contribution.[13] Kenneth E. Zigrosser, RPA-C, and Paul Llobet, M.D., and Margaretville in turn served its verified answer asserting various affirmative defenses and cross-claims against moving defendants seeking indemnification.[14]

Moving defendants then commenced a third-party action against third-party defendants Kingston, Healthalliance Hospital Broadway Campus, Frank T. Lombardo, M.D. and Orthopedic Associates of Dutchess County (collectively, third-party

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[11] Mr. Giffuni alleged injuries include scarring, lingering pain, limited movement, and psychological injuries.

[12] The operative complaint is the Second Amended Verified Complaint, filed on January 21, 2020. Mr. Giffuni also asserts medical malpractice causes of action against Defendants Kenneth E. Zigrosser, RPA-C, and Paul Llobet, M.D., and Margaretville. He also asserts an independent cause of action against Margaretville sounding in negligent hiring, supervision, and retention.

[13] The operative answer is the Verified Answer to Second Amended Verified Complaint, dated January 29, 2020 and filed the same day.

[14] The operative answer is the Verified Answer to Second Amended Verified Complaint, filed on January 31, 2020, dated January 30, 2020.

defendants).[15] Moving defendants allege that the third-party defendants were negligent in their treatment of Mr. Giffuni and asserts a cause of action for contribution against each individually and collectively.[16] Defendants Frank T. Lombardo, M.D. and Orthopedic Associates of Dutchess County served an answer to the amended verified third-party complaint on February 25, 2020, asserting various affirmative defenses and counterclaims for contribution against moving defendants. Defendants Healthalliance Hospital Broadway Campus and Kingston served their answer to the amended third-party complaint on February 28, 2020, asserting various affirmative defenses and counterclaims sounding in indemnification and contribution.[17]

Moving defendants now seek summary judgment dismissing Mr. Giffuni's complaint against them and dismissing all cross-claims and counterclaims asserted by the other parties.

The Parties' Positions

Moving defendants' core positions are threefold: 1) Moving defendants are each distinct legal and corporate entities with only Service America Corp. contracting with ORDA to manage, operate, and oversee the rental business at Belleayre; 2) Service America Corp. and Mr. Giffuni executed a valid waiver relieving Service America Corp.,

[15] Frank T. Lombardo, M.D. is a medical professional associated with both Kingston and Orthopedic Associates of Dutchess County .

[16] The operative third-party complaint is the Amended Verified Third-Party Complaint, filed February 19, 2020. Mr. Giffuni asserts no causes of action against any of the third-party defendants.

its owners, agents, and managers, from any and all liability stemming from all forms of negligence relating to the selection, adjustment, and use of the subject ski equipment rented from the rental shop; and 3) The cross-claims and counterclaims seeking indemnity and contribution all fail as each is asserted by a successive tortfeasor, each of which is only subject to liability for their own negligence and thus contribution and indemnity claims against moving defendants are impermissible.[18]

In support of their position, moving defendants proffer, among other evidence, the deposition transcripts of Mr. Giffuni and Christian Michael Caloro (Mr. Caloro), the general manager of the rental shop at Belleayre. Moving defendants also present an affidavit from Mr. Caloro, exhibiting the ski rental agreement entered into by Mr. Giffuni, and an affidavit from Brian Walters (Mr. Walters), the Director of Risk Management for Centerplate, Inc., exhibiting multiple contracts between ORDA and Service America Corp.

Turning to moving defendants' first argument, they assert that it is well established that liability can never attach to a parent company predicated solely upon its ownership interest in a subsidiary. It argues that absent a showing that the parent company somehow controlled or managed the subsidiary's business activities, merely having a controlling interest in the subsidiary is insufficient to pierce the corporate family

[17] Third-party defendants Healthalliance Hospital Broadway Campus and Kingston inadvertently identify their counterclaim as a cross-claim. Additionally, their answer notes that the entities are one in the same, specifically Healthalliance Hospital Broadway Campus is formerly known as Kingston.

tree attaching liability to the parent company. Presenting Mr. Walters affidavit and exhibited contracts, moving defendants contend that this principle of law must apply to the present case. Mr. Walters attests that neither Centerplate, Inc., Boston Culinary Group, nor Volume Services "ever owned, operated, or managed, or were involved in or responsible for operating or managing, the ski rental shop at [Belleayre] (including the rental, inspection, maintenance, repair, servicing, and/or adjustment of ski rental equipment)" (NYSCEF Doc. No. 136, aff of Brian Walters at 3, ¶ 16).

In further support of this position, and ***attached*** to Mr. Walters' affidavit, moving defendants proffer two contracts between Service America Corp. and ORDA. This first contract (Concession Agreement) between the parties, entitled "Concession License Agreement," grants Service America Corp. certain rights to operate rental shops at various winter sport locations in New York State (*see generally* NYSCEF Doc. No. 136, aff of Brian Walters, exhibit 1, at 3, 4-5). The second contract (Amended Concession Agreement), entitled "The Amendment to Concession License Agreement," amended the prior contract to include rental services at Belleayre (NYSCEF Doc. No. 136, aff of Brian Walters, exhibit 2, at 1). Moving defendants argue that this evidence demonstrates that Centerplate, Inc., Boston Culinary Group, and Volume Services are distinct corporations, none of which have any involvement in the management or operations of the ski rental shop. Thus, moving defendants argue all claims asserted against these defendants

[18] None of the co-defendants nor third-party defendants submit opposition to moving defendants' motion seeking dismissal of the cross-claims and counterclaims for indemnification and contribution. Accordingly, that branch of the motion is granted as unopposed and those cross-claims and counterclaims are dismissed.

(Centerplate, Inc., Boston Culinary Group, and Volume Services) must be dismissed as the sole theory to attach liability to each would be based upon their corporate family tree.

Moving defendants further argue that Mr. Giffuni executed a valid waiver, releasing Service America Corp. from any and all liability stemming from its negligence relating to the ski rental operations and services, requiring dismissal of the action as against it. They assert that waivers relieving a party of liability based upon its own negligence are generally enforceable, with only certain limited exceptions. Critically, they argue only where a waiver is executed between the owner of a recreational facility and a patron, wherein the waiver is a condition to access the facility, will the waiver be voided. They maintain that as Service America Corp. did not manage or operate Belleayre and that the waiver was not a requirement to access Belleayre, there is no public policy or statutory authority voiding the waiver. Moving defendants likewise argue, in the alternative, that the waiver also releases any claims against all moving defendants if the court is unpersuaded by the arguments addressing the corporate family tree.

Supporting this contention, they present the ski rental agreement, highlighting that the agreement provides: "I . . . release Centerplate and its owners, agents and employees from any and all liability for damage and injury to myself or to any person or property resulting from negligence, the selection, adjustment, and use of this equipment accepting myself the full responsibility . . . which may result" (NYSCEF Doc. No. 133, affirmation of moving defendants' counsel, exhibit F, at 1). Likewise, moving defendants

specifically point to the rental agreement's language relating to the inherent risks regarding the ski bindings: "I understand that the ski-boot-binding system which I have rented will not release at all times nor under all circumstances, nor is it possible to predict every situation in which it will release and it is therefore no guarantee of my safety" (*id.*). Additionally, Mr. Caloro, in his affidavit, attests that the ski rental agreement did not grant or permit access to or use of Belleayre's ski trails or ski lifts, but rather a separate agreement exclusively for the rental of skis (*see* NYSCEF Doc. No. 134, aff of Christian Caloro at 2, ¶¶ 6-7). Likewise, he avers that the fee collected, relating to the ski rental agreement, was not related to accessing Belleayre (*id.*, at 2, ¶ 7). Further he attests that Service America Corp. did not manage nor was it involved in operations of Belleayre (*Id.*, at 2, ¶ 5). Moving defendants also present Mr. Giffuni's deposition in which he testified that he read and understood the rental agreement (*see* NYSCEF Doc No. 132, Giffuni tr at 34-35). Accordingly, moving defendants contend that the proffered evidence demonstrates that there is an enforceable waiver protecting it from any exposure to liability by way of its negligence.

In opposition, Mr. Giffuni principally argues that moving defendants both fail to establish their prima facie entitlement to summary judgment dismissing the action, and alternatively, that questions of fact prevent the granting of summary judgment.[19] His

[19] Mr. Giffuni presents, among other evidence, the expert affidavit of Mr. Raul Guisado, in which Mr. Guisado essentially opines that Mr. Reed improperly set Mr. Giffuni's bindings to too low of setting, based upon his height and weight, thus causing the accident. Additionally, he asserts that the oversight of Mr. Reed was likewise inappropriate and represents negligence on the part of the defendants. Such evidence, though certainly relevant to the case in general, is not responsive to the core arguments presented in the moving defendants' motion, which are based on contract interpretation (the waiver) and corporate identity (the corporate family tree).

argument is primarily twofold: first, the waiver is not enforceable, and second, moving defendants' testimonies are inconsistent, failing to establish which moving defendants are responsible for rental services at Belleayre. Also articulated in the opposition papers is the theory that a waiver cannot be enforceable in instances of gross negligence. Gross negligence is a distinct cause of action (*see generally Gomez v Cabatic*, 159 AD3d 62 [2d Dept 2016] [identifying gross negligence as a separate and distinct cause of action]). Here, Mr. Giffuni has not alleged or asserted a cause of action sounding in gross negligence either in his complaint or cognizably read in his bills of particulars (*see* NYSCEF Doc. No. 128 , affirmation of moving defendants' counsel, exhibit A, at 148-157; NYSCEF Doc. No. 129, affirmation of moving defendants' counsel, exhibit B, at 2-3, 13-14, & 23-24). New theories raised for the first time in opposition to summary judgment shall not be considered (*see generally Horn v Hires*, 84 AD3d 1025, 1026 [2d Dept 2011]). Furthermore, even examining the facts and giving Mr. Giffuni every reasonable reading of the allegations, such circumstances present in the instant action fail to justify a finding of gross negligence. Mr. Reed received appropriate accreditation through Rossignol prior to serving as a ski technician, Mr. Caloro attested to various continued training for staff members, and there are no facts showing willful or wanton conduct by Mr. Reed or any of the moving defendants.

Mr. Giffuni argues that exculpatory provisions in contracts are subject to heightened examination and generally disfavored by the courts. He asserts that the

waiver language must be clear, unambiguous, and precise to be given effect. He maintains that the waiver language in the rental agreement is unclear and ambiguous, and thus cannot be enforced. Principally, Mr. Giffuni highlights that the rental agreement and waiver fail to identify or make any reference to Service America Corp. The only entity that it relieves of liability is "Centerplate," which he maintains is ambiguous and imprecise as the record reflects all moving defendants do business under this corporate pseudonym. Thus, as the rental agreement does not identify Service America Corp., he claims it cannot benefit from its protections.

Additionally, Mr. Giffuni posits that the waiver is equally unenforceable as moving defendants increased the risks associated with skiing due to Mr. Reed improperly setting the bindings. Mr. Giffuni argues that where a defendant affirmatively increases the risk of an activity, any waiver of liability is not binding. Mr. Giffuni proffers the expert affidavit of Mr. Guisado, who opines "to a reasonable degree of technical certainty . . . that properly adjusted bindings have a reduced risk of releasing inadvertently and improper binding adjustment unnecessarily exposes skiers to an increased risk of injury" (NYSCEF Doc. No. 143, Raul Guisado aff at 5, ¶ 9). He further specifically expresses that "[b]y improperly adjusting the bindings on [Mr. Giffuni's] skis, Mr. Reed increased the risk of injury to Mr. Giffuni, and created a dangerous condition over and above the usual risks inherent in the sport of alpine skiing" (*id.* at 6, ¶ 12). In line with this argument, Mr. Giffuni asserts that he could not have assumed the risk, as his injuries resulted from affirmative negligence on the part of moving defendants, not the inherent

risks related to skiing. Thus, Mr. Giffuni argues that as the affirmative negligent conduct of moving defendants increased his risk of injury and created distinct risks outside the scope of the inherent risks of skiing, the waiver cannot be enforced.

Mr. Giffuni's final argument addressing the waiver is that it is voided pursuant to statutory authority. He contends that New York statutory law proscribes waivers of negligence, where an owner or operator of a recreational facility requires a patron to execute a waiver absolving them of liability and accepts payment. Supporting this contention, Mr. Giffuni presents the rental shop sales receipt, which he contends demonstrates that he purchased a ski pass to access Belleayre in the same transaction in which he rented skis from the rental shop (*see* NYSCEF Doc. No. 141, affirmation of Giffuni's counsel, exhibit C; *see also* NYSCEF Doc. No. 132, Giffuni tr at 31, lines 5-7). He argues that as the rental shop accepted payments for the ski pass in the same transaction as the ski rental, and Mr. Giffuni was required to execute a waiver to rent skis, that the rental agreement he executed is voided pursuant to statutory authority.

Finally, Mr. Giffuni maintains that inconsistencies in moving defendants' deposition testimony and affidavits prevent the issuance of an order for accelerated judgment. Principally, he asserts that Mr. Caloro avers that different entities operated the ski rental shop at Belleayre. Mr. Giffuni points out that during Mr. Caloro's deposition, he testified that Boston Culinary Group operated and managed the ski rental shop, while in his affidavit he avers that Service America Corp. is the managing and operating corporate entity overseeing the rental shop at Belleayre. Accordingly, Mr.

Giffuni argues that the supporting evidence presented by moving defendants fails to establish a prima facie case as it is inconsistent and questions of fact remain as to which moving defendant was responsible for the ski rental shop at Belleayre.

In reply, moving defendants principally reassert their initial arguments presented in their moving papers. They again maintain that the ski rental shop was solely operated by Service America Corp., and that the other defendants had no role or oversight in its operations. They assert that Mr. Giffuni's claim that Mr. Caloro's sworn statements are inconsistent is not supported by the record, and that the only competent evidence demonstrates that Service America Corp. operates the rental shop and did not operate Belleayre. Addressing Mr. Giffuni's contention that statutory authority voids the waiver, moving defendants assert his reliance on the statute is misplaced. Critically, moving defendants argue that for the law to apply, the waiver must be executed between the owner and/or operator of the recreational facility and the patron, but that the proffered evidence clearly demonstrates that neither Service America Corp., nor any of the other moving defendants, operate or own Belleayre. Further, they argue that the law requires the waiver be a necessary condition to access the recreational facility, which they assert is clearly not present, as the release is related to the renting of skis not accessing the various trails at Belleayre. Accordingly, moving defendants assert that Mr. Giffuni failed to raise questions of fact to sustain their burden.

Discussion

On a motion for summary judgment the court's function is issue finding, not issue determination (*see Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018] [internal citations omitted]). "A party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Id.*, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1986]). In other words, "plaintiff need only raise a triable issue of fact regarding the element or elements on which the defendant has made its prima facie showing" (*McCarthy v Northern Westchester Hosp.*, 139 AD3d 825, 826 [2d Dept 2016] [internal quotation marks omitted]).

"In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be

resolved in favor of the nonmoving party" (*Santiago v Joyce*, 127 AD3d 954, 954 [2d Dept 2015] [internal citations omitted]). "To grant summary judgment it must clearly appear that no material and triable issue of fact is presented" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal citation omitted]). Further, "[s]ummary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" (*Stukas v Streiter*, 83 AD3d 18, 23 [2d Dept 2011] [internal citation omitted]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]).

To be entitled to summary judgment dismissing a claim of negligence a defendant must demonstrate through the submission of admissible evidence that it either: 1) did not owe a duty to plaintiff, 2) did not breach its duty to plaintiff; or 3) any such breach was not the proximate cause of plaintiff's injuries (*see generally Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016] [discussing the elements of negligence]; *see also Darby v Cie. Natl. Air France*, 96 NY2d 343, 347 [2001], op after certified question answered sub nom. *Darby v Cie. Nat. Air France*, 13 Fed Appx 37 [2d Cir 2001]). "[W]hile the absence of privity does not foreclose recognition of a duty, it is still the responsibility of the courts, in fixing the orbit of duty" (*Strauss v Belle Realty Co.*, 65 NY2d 399, 402 [1985]). "Without a duty running directly to the injured person there can

be no liability in damages, however careless the conduct or foreseeable the harm" (*Lauer v City of New York*, 95 NY2d 95, 100 [2000]).

To be entitled to summary judgment dismissing a claim for negligent hiring, retention, and supervision, a defendant must demonstrate through the submission of admissible evidence that it did not know nor should have known of an employee's propensity to commit injury. A defendant is also entitled to the dismissal of a claim for negligent hiring, retention, and supervision if it can demonstrate that it and the tortfeasor were not in an employer-employee relationship and/or co-employee relationship and that the tort did not occur on the employer's premises or with the employer's chattel (*see Bouchard v New York Archdiocese*, 719 F Supp 2d 255, 261 [SDNY 2010] citing *Ehrens v. Lutheran Church*, 385 F 3d 232, 235 [2d Cir 2004]; *see also Connell v Hayden*, 83 AD2d 30, 50, [2d Dept 1981]). Further, "there is common-law duty to institute specific procedures for hiring employees unless the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee" (*Kenneth R. v R.C. Diocese of Brooklyn*, 229 AD2d 159, 163 [2d Dept 1997]).

"Where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondeat superior and no claim may proceed against the employer for negligent hiring, retention, supervision or training" (*Talavera v Arbit*, 18 AD3d 738, 738 [2d Dept 2005]). An exception exists only where punitive damages are sought based upon facts evincing gross negligence in hiring or retention of an employee (*see Quiroz v Zottola*, 96 AD3d 1035,

1037 [2d Dept 2012]; *Coville v Ryder Truck Rental, Inc.*, 30 AD3d 744, 745 [3d Dept 2006]). Absent these distinct and separate allegations, where a defendant is exposed to liability through the theory of respondeat superior, there cannot be a contemporaneous claim for negligent hiring, retention, supervision or training.

Boston Culinary Group, Centerplate Inc., and Volume Services

Generally "[a] parent company will not be held liable for the torts of its subsidiary unless it can be shown that the parent exercises complete dominion and control over the subsidiary" (*Serrano v New York Times Co., Inc.*, 19 AD3d 577, 578 [2d Dept 2005]). Further, where there is no relationship between a plaintiff and defendant a duty cannot exist (*see generally Lauer*, 95 NY2d at 100). Here, Boston Culinary Group, Centerplate, Inc., and Volume Services demonstrated through competent evidence that none of these entities owed any duty to Mr. Giffuni. Moving defendants proffered contracts with ORDA which clearly demonstrate that the only entity with a connection to the rental shop at the relevant time was Service America Corp. In this regard, the Concession License Agreement granted *Service America Corp.* exclusive rights to manage equipment rental/ski tuning concessions to several winter sport locations. The Concession License Agreement provides:

> The *concession licence* ("License") made this 16th day of July, 2011 *by and between [ORDA]*, with offices at 2634 Main Street, Lake Placid, New York 12946 *and [Service America Corp.]* (hereinafter the "Licensee"), with offices at 2187 Atlantic Street, Stamford, CT 06902.
>
> . . .

> WHEREAS, *ORDA* issued a Request for Proposal and *accepted a Proposal submitted by Licensee* to furnish and install certain equipment and improvements and *to exclusively manage and operate* the Food Services and Merchandise Services and *equipment rental/ski tuning concessions* at the facilities known as Gore Mountain Ski Resort located in North Creek in the Town of Johnsburg, New York, the Olympic Ski-jumping Complex, the Olympic Center and Lake Placid Conference Center and the Olympic Sports Complex, all located in the Town of North Elba, New York, Whiteface Mountain and the Castle (on Memorial Highway) located in the Town of Wilmington, New York (the "Facilities") (NYSCEF Doc. No. 136, aff of Brian Walters, exhibit 1, at 4 [emphasis added]).

The Amended Concession Agreement extended *the exclusive right held by Service America Corp.* to Belleayre: "*Licensee shall have the exclusive right to continue to provide* food, beverage, and merchandise services, including *the ski rental, tuning and locker rental services at Belleayre*" (NYSCEF Doc. No. 136, aff of Brian Walters, exhibit 2, at 1 [emphasis added]).

Additionally, Mr. Walters' affidavits demonstrate that Boston Culinary Group, Centerplate, Inc., and Volume Services had no role in managing, operating, or overseeing the ski rental shop at Belleayre. Mr. Walters avers that:

> Pursuant to the [Concession Agreement] and [Amended Concession Agreement], beginning in approximately October 2013, [Service America Corp.] operated and managed the ski rental shop at [Belleayre] (including the rental, inspection, maintenance, repair, servicing, and/or adjustment of ski rental equipment), as well as the food concessions and retail shops.
>
> [Service America Corp.] was operating and managing the ski rental shop at [Belleayre] on February 1, 2014 (including the

> rental, inspection, maintenance, repair, servicing, and/or adjustment of ski rental equipment).
>
> On February 1, 2014, the employees of the ski rental shop at [Belleayre] were working on behalf of [Service America Corp.]. Other than [Service America Corp.], neither Centerplate, Inc. nor any of its subsidiaries, including Boston Culinary Group, Inc., [and Volume Services] . . . ever owned, operated, or managed, or were involved in or responsible for operating or managing, the ski rental shop at [Belleayre] (including the rental, inspection, maintenance, repair, servicing, and/or adjustment of ski rental equipment), including on February 1, 2014 (NYSCEF Doc. No. 136, aff of Brian Walters at 3, ¶¶ 13-16).

Thus, moving defendants established Boston Culinary Group, Centerplate, Inc., and Volume Services are entitled to summary judgment dismissing both the claim for negligence and the claim for negligent hiring, retention, and supervision, as they were not involved in any capacity in managing or operating the ski rental facility, and thus there was no duty directly running from them to Mr. Giffuni.

In opposition, Mr. Giffuni fails to raise a triable issue of fact defeating moving defendants' prima facie case. The expert affidavit of Mr. Guisado fails to rebut the assertions averred in Mr. Walters' affidavit. While Mr. Guisado's statements are sufficient to demonstrate questions of fact exist as to whether Mr. Reed's actions constitute negligence, the instant motion rests on contract interpretation and the corporate structure of the parties. To the extent Mr. Guisado's statements provide opinions related to the operation of the ski rental shop and the structure of its ownership, such comments

are wholly speculative and not within his knowledge, nor in the area of his expertise and are accordingly disregarded (*see* NYSCEF Doc. No. 139, aff of Raul Guisado, at 4, ¶ 7).

Further, Mr. Giffuni's assertions that Mr. Caloro's testimonies are inconsistent is not supported by the record. In the pertinent part of his deposition testimony, Mr. Caloro attested:

> "I am the general manager of operations for Centerplate at [Belleayre].
> . . .
>
> I've been the general manager at [Belleayre] since 1997.
> . . .
>
> [In 1997, I was employed by] Boston Concessions Group.
> . . .
> That group, we changed our name to Boston Culinary Group. And then Boston Culinary Group and Centerplate merged in I believe it was 2012 - - I'm sorry, 2009 is when Centerplate and Boston Culinary Group merged" (NYSCEF Doc. No. 135, Caloro tr at 8, line 25, at 9, lines 2-13).

Mr. Caloro's affidavit clarifies that his employer is Service America Corp. which does business under the name of Centerplate. This assertion is supported by the contracts exhibited to Mr. Walters' affidavit, which identifies the licensee as Service America Corp. d/b/a Centerplate. While Mr. Caloro's deposition testimony is imprecise, it does not create a question of fact as to which entity operated the rental shop as moving defendants demonstrated that Service America Corp. was doing business as Centerplate. Moreover, his affidavit is consistent with his deposition testimony, and it is clear from the record that Service America Corp. performs business as Centerplate, and that Service

America Corp. was the corporate entity responsible for operating the rental shop at Belleayre at the time of the accident. Accordingly, moving defendant's motion to the extent it seeks summary judgment dismissing all causes of actions asserted against Boston Culinary Group, Centerplate, Inc., and Volume Services is granted.

Service America Corp.

As previously stated, where a company is exposed to liability based upon the theory of respondeat superior, contemporaneous claims for negligence and negligent hiring, retention, and supervision cannot exist absent specific claims for punitive damages for gross negligence (*see Quiroz v Zottola*, 96 AD3d 1035, 1037 [2d Dept 2012]; *Talavera v Arbit*, 18 AD3d 738, 738 [2d Dept 2005]; *Coville v Ryder Truck Rental, Inc.*, 30 AD3d 744, 745 [3d Dept 2006]). Here, the record is clear that Mr. Reed was functioning within his capacity as an employee of Service America Corp. Mr. Caloro attests that Mr. Reed was hired to specifically perform the task he was performing and his acts were performed while in the course of his work (*see generally* NYSCEF Doc. No. 135, Caloro tr at 41-44, 60-62, 64 [wherein Mr. Caloro attests to the hiring of Mr. Reed and Mr. Reed's servicing of Mr. Giffuni]). As previously discussed, Mr. Giffuni's allegations in the complaint and the bills of particulars fail to allege any form of gross negligence. Further, neither the pleadings nor bills of particulars seek punitive damages. Accordingly, that branch of moving defendants' motion seeking summary judgment dismissing Mr. Giffuni's claim for negligent hiring, retention, and supervision is granted.

Turning to the claim of negligence against Service America Corp., it fails to establish its prima facie case conclusively establishing a defense to the claim. The sole theory presented in the motion is that Service America Corp. is immune to liability based upon Mr. Giffuni executing a valid waiver absolving it from any negligence. Specifically, and as aforementioned, the rental agreement provides:

> "I accept and clearly understand that there are inherent and other risks involved in the sport of skiing and snowboarding, for which this equipment is to be used; that injuries are a common and ordinary occurrence of this sport, and I freely assume those risks.
> . . .
>
> I understand that the ski-boot-binding system which I have rented will not release at all times nor under all circumstances, nor is it possible to predict every situation in which it will release and it is therefore no guarantee of my safety. Snowboard and snowblades bootbinding systems is a non-release system.
> . . .
>
> I therefore release Centerplate and its owners, agents and employees from any and all liability for damage and injury to myself or to any person or property resulting from negligence, the selection, adjustment, and use of this equipment accepting myself the full responsibility for any and all such damage or injury of any kind which may result" (NY St Cts Elec Filing [NYSCEF] Doc. No. 133, affirmation of moving defendants' counsel, exhibit F, at 1).

"When parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "Although exculpatory clauses in a contract, intended to insulate one of the parties from liability resulting from his own negligence,

are closely scrutinized they are enforced, but with a number of qualifications" (*Ciofalo v Vic Tanney Gyms, Inc.*, 10 NY2d 294, 296 [1961]). However, "whether or not a writing is ambiguous is a question of law to be resolved by the courts" (*Nappy v Nappy,* 40 AD3d 825, 826 [2d Dept 2007] [internal quotation marks and citation omitted]). "Ambiguity is determined within the four corners of the document; it cannot be created by extrinsic evidence that the parties intended a meaning different than that expressed in the agreement" (*Martelloni v Martelloni,* 186 AD3d 1663, 1665 [2d Dept 2020] [internal quotation marks and citation omitted]). "Ambiguity is present if language was written so imperfectly that it is susceptible to more than one reasonable interpretation" (*Id.*). "When a term or clause is ambiguous, the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact" (*Arnell Const. Corp. v New York City School Const. Auth.*, 144 AD3d 714, 716 [2d Dept 2016] [internal quotation marks and citation omitted]).

Strictly read, the court, as a matter of law, cannot enforce the waiver present in the rental agreement. It is undisputed that each corporate entity does business under the name of Centerplate. Read at its most basic interpretation, the release is ambiguous as to which entity Mr. Giffuni immunized from liability. Nowhere in the rental agreement does it provide clarification or a definition as to which corporate entity doing business as Centerplate it is absolving. No fair interpretation of the contract would warrant a finding that, on its face, it releases all the Centerplate entities from liability, as Mr. Giffuni, and any patron of the rental shop, would likely presume that he or she was entering into a

contract with only a single entity. Further supporting the determination that the rental agreement is ambiguous is that moving defendants themselves argue, in the alternative, that the rental agreement could apply to each corporate defendant if the court were to find they were associated with the rental shop's operations. As such, whether the rental agreement's waiver is enforceable rests on a determination resolving the ambiguities of the contract, which is for the trier of fact to decide. As ambiguity exists within the language of the rental agreement the court does not presently reach a determination as to whether General Obligation Law § 5-326 voids the rental agreement.

As moving defendants failed to establish their prima facie case, the court need not address the adequacy of Mr. Giffuni's opposition (*see generally Manns v Vaz*, 18 AD3d 827, 828 [2d Dept 2005]).

To the extent not specifically addressed herein, the parties' remaining contentions have been considered and found to be either meritless and/or moot.

Conclusion

Accordingly, it is

ORDERED that branch of moving defendants' motion seeking summary judgment dismissing all counterclaims and cross-claims for contribution and indemnification is granted; and it is further

ORDERED that branch of moving defendants' motion seeking summary judgment dismissing Mr. Giffuni's claims as to Centerplate, Inc., Boston Culinary Group, and Volume Services is granted; and it is further

ORDERED that branch of moving defendants' motion seeking summary judgment dismissing Mr. Giffuni's claim for negligent hiring, retention, and supervision is granted; and it is further

ORDERED that branch of moving defendants' motion seeking summary judgment dismissing Mr. Giffuni's claim for negligence is denied.

This constitutes the decision and order of the court.

ENTER,

Ellen Gesmer

JSC