IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

WAYNE MICHAELCHUCK AND MARY MICHAELCHUCK,	:	
Plaintiffs	:	
vs.	:	No. 10-2905
PEAK RESORTS, JACK FROST MOUNTAIN COMPANY, JFBB SKI AREAS, INC., AND ANHEUSER-BUSCH, INC.	:	
Defendants	:	

Annette Ferrara, Esquire	Counsel for Plaintiff
Hugh M. Emory, Esquire	Counsel for Defendants
Yuri J. Brunetti, Esquire	Counsel for Defendants

MEMORANDUM OPINION

Matika, J. – September 13th 2012

Before the Court are two Motions for Summary Judgment, one filed collectively by Defendant Peak Resorts, (hereinafter "Peak Resorts"),[1] Defendant Jack Frost Mountain Company (hereinafter "Jack Frost"),[2] and Defendant JFBB Ski Areas, Inc., (hereinafter "JFBB"),[3] and the other motion filed by Defendant Anheuser-Busch Inc., (hereinafter "Anheuser") to a complaint filed by Plaintiffs Wayne and Mary Michaelchuck, (hereinafter

[1] Peak Resorts is the parent corporation of Defendant JFBB Ski Areas, Inc., which is a wholly owned subsidiary of it.

[2] Jack Frost owned and leased the premises known as Jack Frost Ski Resort to Defendant JFBB Ski Areas, Inc.

[3] JFBB leased, managed, and operated the premises of Jack Frost Ski Resort.

"Michaelchucks") who initiated this slip-and-fall action against all Defendants. For the reasons that follow, we **GRANT** the motion as to Defendants Jack Frost and Peak Resorts, but **DENY** the motion as to Defendants JFBB and Anheuser.

I. FACTUAL and PROCEDURAL BACKGROUND DISCUSSION

Defendant JFBB, by and through its employees, contracted with Defendant Anheuser to sponsor different sporting contests at Jack Frost Ski Resort.[4] One such sporting event, a scavenger hunt, was held on March 13, 2009. Plaintiff, Wayne Michaelchuck, along with three companions traveled to Jack Frost Ski Resort and decided to participate in that scavenger hunt.

The course design[5] for the scavenger hunt required all contestants to start the race outside the ski lodge. Once the race began, contestants were obligated, in no particular order, to stop at four different "Bud Light Checkpoints" and have their registration card punched each time as proof that they stopped at each checkpoint. After visiting all four checkpoint

[4] The term "Jack Frost Ski Resort," as mentioned throughout this opinion and as referred by witnesses or parties, refers to the name of the ski resort itself and not a party or entity involved in this litigation or the scavenger hunt itself.

[5] Christopher McKee, a Senior District Manager for Anheuser, designed the course setup and sent a copy, via email, of the proposed course to JFBB's sales and marketing representative. At the time of his deposition, McKee did not recall whether JFBB responded with an approval of the course design at that point in time. However, Anheuser eventually got the approval of JFBB to go forward with the event.

locations, the contestants needed to obtain a Bud Light key chain from the E2000 bar, which was located inside the ski lodge. The first contestant to turn in a completed card and their Bud Light key chain would win "the ultimate ski package."

Plaintiff, Wayne Michaelchuck, started the race together with his three friends, but as the race went on, he was only skiing with one of his friends. After he and his friend stopped at all four checkpoints and got their card punched, they skied back to the lodge for what they thought was the finish line. However, as Plaintiff, Wayne Michaelchuck, approached the ski lodge, he was informed that the finish line for the race was at the bar inside the lodge and was directed to go there by ascending stairs to get to that location.[6]

Plaintiff, Wayne Michaelchuck, removed his skies but kept his plastic shell boots on as he approached the ski lodge to go inside. At the same time, another contestant was also removing her skies and entering the ski lodge. Once Plaintiff and the other contestant were both inside the ski lodge, they traveled side-by-side up two flights of stairs until they were outside the E2000 bar.

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[6] In Plaintiff, Wayne Michaelchuck's, deposition, he stated he was unsure if it was another contestant or an employee of one of Defendants JFBB or Anheuser that directed and informed him that the finish line was inside the ski lodge at the bar. (Michaelchuck Dep. 20:22, Sept. 28, 2011).

When Plaintiff, Wayne Michaelchuck entered the bar area, he observed the "finish line" on the far side of the room near prize tables. He and the other contestant, in hopes of winning one of the prizes, both raced across the room towards the prize tables. In the middle of the room was a section of wooden parquet flooring. As Plaintiff, Wayne Michaelchuck was running at full speed across the room and while on the parquet floor section, his feet went out from under him.[7] Plaintiff, Wayne Michaelchuck's head crashed into one of the prize tables,[8] and his collarbone collided with a metal bar stool. Due to the fall, he could not raise his right arm.

Plaintiffs instituted this action against all Defendants under a slip-and-fall negligence theory.[9] However, after depositions, where Plaintiff, Wayne Michaelchuck and his friend, who witnessed Plaintiff, Wayne Michaelchuck fall, testified that they are unsure if there was in fact a "puddle of dirty water"

[7] Plaintiff, Wayne Michaelchuck, in his deposition, acknowledged he did not notice the wooden parquet floor as he was running across the room, as this was the first time he was ever inside the E2000 bar. (Michaelchuck Dep. 33:23, Sept. 28, 2011).

[8] Plaintiff, Wayne Michaelchuck, did not sustain any head injuries because he was wearing a helmet.

[9] Plaintiffs' main theory of liability as set forth in the complaint is that all Defendants had a duty to keep and maintain the wooden floor in a reasonably safe condition. According to Plaintiffs, Defendants breached this duty by allowing water to accumulate on the wooden floor for a long period of time, and from Defendants' breach of their duty, Plaintiff, Wayne Michaelchuck slipped on this puddle of water and suffered certain injuries.

on the wooden floor, Plaintiffs changed their theory of liability and now allege that the overall design of the scavenger hunt was hazardous. More specifically, Plaintiffs argue Defendants breached their duty of care to Plaintiff, Wayne Michaelchuck, by having the "finish line' of the race inside the ski lodge which required contestants to travel across the wooden floor with their ski boots on.[10] Each Defendant has filed a Summary Judgment Motion claiming there is no genuine issue of material fact or law, and that they should each be entitled to judgment as a matter of law. The Court will consider these Summary Judgment Motions together since the issues in both motions are the same.

II. LEGAL DISCUSSION

A trial court can grant a motion for summary judgment whenever there are no genuine issues of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report. Pa.R.C.P. 1035.2. In response, the non-moving party must demonstrate that there is a genuine issue for trial and cannot rest upon the mere

[10] After Plaintiff, Wayne Michaelchuck's, deposition, Plaintiffs obtained a liability expert. A report was prepared by this expert who concluded that the finish line area of the event was situated in such a location that the race required contestants to rush across a "slippery hardwood dance floor in their wet ski boots." The report goes on to state that the positioning of the finish line area created a serious hazard which caused Plaintiff's slip and fall accident.

allegations and denials of his pleadings. *Phaff v. Gerner,* 451 Pa. 146, 149, 303 A.2d 826, 829 (1973); *Davis v. Resources for Human Development, Inc.,* 770 A.2d 353, 357 (Pa. Super. 2001). In granting a Motion for Summary Judgment the Trial Court must decide "whether the admissible evidence in the record, in whatever form, from whatever source, considered in the light most favorable to the [non-moving party] to the motion, fails to establish a prima facie case . . ." to allow the case to continue to trial. *In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238 (3d Cir.1983), *cert. denied*, 481 U.S. 1029, 107 S.Ct. 1995 (1985).

In stating a cause of action, a complaint, must at a minimum, set forth such necessary facts upon which a cause of action can be based. *Burnside v. Abbott Laboratories*, 505 A.2d 973 (Pa. Super. 1985). However, it is not necessary that a plaintiff outline the specific legal theory or theories underlying the complaint. *Weiss v. Equibank*, 460 A.2d 271 (Pa. Super. 1983). It is the duty of the court to discern from the alleged facts in the complaint the cause of action, if any, stated therein. *Bartanus v. Lis*, 480 A.2d 1178 (Pa. Super. 1984). The complaint need only give a defendant notice of the claim or claims being asserted; however, the complaint must summarize the essential facts to support such a claim or claims. *Alpha Tau Omega*

Fraternity v. University of Pennsylvania, 464 A.2d 1349 (Pa. Super. 1983). A plaintiff cannot evade this duty by a general averment that the facts are in the possession of the defendant.

In stating a cause of action in negligence, the pleader must aver in the complaint a duty, a breach of that duty, a causal relationship between the breach and the resulting injury, and actual loss. *Unglo v. Zubik*, 29 A.2d 810 (Pa. Super. 2011).

Michaelchucks allege in paragraphs 12, 27, 34, and 41 of the Complaint that each Defendant had a specific duty of care to Plaintiff, Wayne Michaelchuck, namely, "to keep and maintain the said area in a reasonably safe condition so that said area would not constitute a menace, dangerous nuisance . . . negligent condition for persons lawfully using said area." Plaintiffs list eighteen (18) different ways each Defendant breached the duty of care they owed to Plaintiff, Wayne Michaelchuck.[11] Six of the averments as to each Defendant breaching their duty of care allege negligence in the overall course design and failure of Defendants' employees to conduct the scavenger hunt in a safe manner. Plaintiffs have also pled the other two necessary elements for a negligence cause of action, specifically, causation and damages. Therefore, Plaintiffs have pled a proper

[11] The Court does not disagree with Defendants' argument that Plaintiffs' main theory of liability for how Defendants breached their duty of care to Plaintiff, Wayne Michaelchuck, is that dirty water remained on the parquet wooden floor for a long period of time. However, that is not Plaintiffs' only theory of liability.

negligence cause of action.

Defendants argue to this Court that Plaintiffs have only pled one theory of liability, that is, dirty water left on the wooden parquet floor for a long period of time. Because Plaintiffs have only pled this one theory of liability, as Defendants argue, Plaintiffs cannot plead a new theory of liability once the applicable statute of limitations has run. If Plaintiffs were trying to introduce additional facts that would state a new cause of action, by way of an amendment to the complaint, the Court would agree with Defendants and bar Plaintiffs from pleading such new facts. However, as stated above, Plaintiffs are not introducing new facts, but rather emphasizing a new theory of liability, that the overall course design placed contestants in danger by requiring each contestant to cross over the wooden floor to finish the scavenger hunt.

The Pennsylvania Supreme Court, in *Kuisis v. Baldwin-Lima-Hamilton Corporation*, 319 A.2d 914 (Pa. 1974), stated that the notion that a complaint weds a plaintiff to a particular theory of liability is foreign to Pennsylvania pleadings. Pennsylvania is a *fact pleading, not theory pleading*, and thus a plaintiff is free to proceed on any theory of liability which the facts alleged in the complaint will support. *Id.* 319 at 918 (emphasis added). The Superior Court in expanding on *Kuisis*, held that

"it is not necessary that the plaintiff identify the specific legal theory underlying the complaint." *Cardenas v. Schober*, 783 A.2d 317, 325 (Pa. Super. 2001). Based on these cases, a plaintiff need not plead a specific theory of liability in a complaint.[12] Furthermore, Pa.R.C.P. 1019(a) requires a plaintiff to state in a complaint only "[t]he material facts on which a cause of action or defense is based . . . ."

Based on the above stated law, Plaintiffs in this case are free to pursue any theory of liability, as long as such theory is supported by the operative facts in the Complaint.[13] A plaintiff is not married to one particular theory of liability if, after discovery, a more viable theory of liability is present and the facts alleged in the complaint support such a theory.

As in the case before the Court, in examining the Complaint,

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[12] The terms "legal theory" and "claim" entail two different concepts. As defined in Black's Law Dictionary, "legal theory" is "the principle under which a litigant proceeds, or on which a litigant bases its claims or defenses in a case." BLACK'S LAW DICTIONARY (9th ed. 2009). A "claim" on the other hand is defined as "the aggregate of operative facts giving rise to a right enforceable by a court." BLACK'S LAW DICTIONARY (9th ed. 2009). Pennsylvania Courts have deciphered the difference between these two terms in requiring a plaintiff only to plead a claim upon which a cause of action can be based, not a legal theory. *See*, *Grossman v. Barke*, 868 A.2d 561 (Pa. Super. 2005); *Estate of Swift by Swift v. Northeastern Hospital,* 690 A.2d 719 (Pa. Super. 1997).

[13] Based on the depositions and facts pled, the Court concurs with Defendants' argument that there is little, if any, evidence to support Plaintiff's theory of liability that Defendants breached their duty of care by allowing "dirty water" to accumulate on the wooden parquet floor for a long period of time. However, as stated throughout this Opinion, that is not Plaintiffs only theory of liability.

there are facts pled to support Plaintiffs' theory of liability that the overall course design of the scavenger hunt was hazardous to the contestants. The Court does not agree with Defendants contention that there are no facts to support Plaintiff's new theory or that Plaintiffs are wed to only one theory of liability. A plaintiff, as in this case, can plead multiple theories of liability under a negligence cause of action, so long as the facts in the complaint place a defendant on notice of that cause of action. *See* e.g., *Brannan v. Lankenau Hospital*, 417 A.2d 196 (Pa. 1980); *Ferry v. Fisher*, 709 A.2d 399 (Pa. Super. 1998); *Neal v. Bavarian Motors, Inc.*, 882 A.2d 1022 (Pa. Super. 2005).

Although there are two separate motions for summary judgment before the Court, in actuality, all four Defendants have motioned this Court to grant summary judgment in their respective favors.[14]

The facts alleged in the pleadings, along with the testimony elicited in the depositions undoubtedly create a genuine issue of material fact as to the liability of Defendants JFBB and Anheuser for Plaintiffs' alleged injuries. In the answer filed collectively by Defendants Peak Resorts, Jack Frost, and JFBB,

[14] Defendants Peak Resort, Jack Frost, and JFBB filed their motion collectively, while Defendant Anheuser filed its summary judgment motion separately.

JFBB admits it operated and managed the premises of Jack Frost Resorts and more specifically the E2000 bar at the time Plaintiff, Wayne Michaelchuck, sustained his injuries.

Christopher McKee, Defendant Anheuser's Senior District Manager at the time of Plaintiff's fall, stated in his deposition that as an employee of Defendant Anheuser, he designed the scavenger hunt course, which was eventually approved by JFBB's Sales and Marketing Representative Heather Schiffbauer. McKee also acknowledged that there were employees of Anheuser inside the ski lodge as the contestants entered and presented their completed registration cards.[15]

Additionally, two contestants of the scavenger hunt, Terrance McGinn and Melvin Stiles, alleged in their depositions respectively that they notice what they perceived to be employees of Defendant JFBB throughout the course in the form of ski patrollers. Given all that has been presented to this Court, there is a genuine issue of material fact as to the liability of Defendants JFBB and Anheuser, and thus their motions for summary judgment as denied.

Conversely, the summary judgment motions filed by Defendants Peak Resorts and Jack Frost are granted. In Plaintiffs'

[15] Contestants who decided to participate in the event, not necessarily to win a prize, but rather just to participate, could turn in their registration card to any Anheuser employee on the first floor of the ski lodge. (Michaelchuck Dep. 44:6, Jan. 6, 2012).

Complaint, it is alleged that Defendants, Peak Resorts and Jack Frost Mountain Company are liable to Plaintiffs because they failed "to direct [their] employees, agents, servants, workmen, of a safe means of conducting a sport contest" and these Defendants or its employees operated the contest in such a manner as to cause injury to the Plaintiff, Wayne Michaelchuck, "by failing to provide adequate supervision of the individual contestants in question." In its Answer, Peak Resorts denies any interest in Jack Frost Ski Resorts as Peak Resorts is only the parent corporation of JFBB Ski Areas, Inc., a wholly owned subsidiary of Peak Resorts. Defendant, Jack Frost, avers that it leased the premises of Jack Frost Ski Resort to Defendant JFBB and has no involvement in the management, operation, or control of the ski resort.

Defendants, Peak Resort and Jack Frost claim that neither of them has nor had any contractual relationship with Defendant Anheuser as such relationship vis-à-vis the scavenger hunt was solely between Defendants JFBB and Anheuser. Neither did Defendants, Jack Frost nor Defendant Peak Resort have any employees involved with the management and operation of the ski resort as such management operation was solely within the province of Defendant JFBB.

As stated above, a non-moving party, in a Summary Judgment Motion, may not rest upon mere allegations or denials of pleadings. Rather, the non-moving party must set forth specific facts demonstration that there are genuine issues for trial. Failure to allege such specific facts will result in summary judgment, if appropriate, against the non-moving party. Pa.R.C.P. 1035.3; *Washington Federal savings and Loan Association v. Stein*, 515 A.2d 980 (Pa. Super. 1986). Plaintiffs have not provided the Court with any evidence or affidavits to further their claim that Defendants Peak Resort and Jack Frost were involved in the negotiations with Anheuser, the designing of the scavenger hunt course, the use of any employees or agents to supervise the course, or any control of any operations at the ski resort, including the scavenger hunt.

Moreover, the relationship between and the dynamics of that relationship between Jack Frost and JFBB and Peak Resorts and JFBB is such that the theory of "respondeat superior" is not applicable to impose liability on Defendants Jack Frost and Peak Resorts.

The relationship between Jack Frost and JFBB is in its simplest form, landlord-tenant, and more specifically a landlord not in possession of the land. In Pennsylvania, a landlord out of possession is generally not responsible for injuries suffered

by a business invitee on the leased premises. *Dinio v. Goshorn*, 270 A.2d 203 (Pa. 1969); *Pierce v. Philadelphia Housing Authority*, 486 A.2d 1004 (Pa. Super 1985). This rule, however, is subject to certain exceptions so that a landlord out of possession may incur liability if: 1) he has reserved control over a defective portion of the demised premises, *see Smith v. M.P.W. Realty Co.*, 225 A.2d 227 (Pa. 1967); the demised premises are so dangerously constructed that the premises are a nuisance *per se*, *Miller v. Atlantic Refining Co.*, 12 D. & C.2d 713, 719 (1957), *aff'd*, 143 A.2d 380 (Pa. 1958); 3)the lessor has knowledge of a dangerous condition existing on the demised premises at the time of transferring possession and fails to disclose the condition to the lessee, *see id.*; 4) the landlord leases the property for a purpose involving the admission of the public and he neglects to inspect for or repair dangerous conditions existing on the property before possession is transferred to the lessee; *see, Yarkosky v. The Caldwell Store, Inc.*, 151 A.2d 839 (Pa. Super. 1959); 5) the lessor undertakes to repair the demised premises and negligently makes the repairs, *see, Coradi v. Sterling Oil Co.*, 105 A.2d 98 (Pa. 1954); or 6) the lessor fails to make repairs after having been given notice of and a reasonable opportunity to remedy a dangerous condition existing on the leased premises; *see,*

Goodman v. Corn Exchange National Bank & Trust Co., 200 A. 642 (Pa. 1938).

None of the stated exceptions to the general rule that an out-of-possession landlord is not liable for injuries suffered by a business invitee on the leased premises are applicable in this case. Plaintiffs have alleged a defect in the course design not a defect in the premises itself. Hypothetically, if Plaintiffs alleged that a nail was sticking up from the wooden parquet flooring and Defendant Jack Frost was or should have been aware of the dangerous condition, then there may be a genuine issue of material fact as to Jack Frost being liable. However, Plaintiffs have not plead such facts and thus Defendant Jack Frost, as an out-of-possession landlord is not liable to Plaintiffs for the alleged acts of the tenant, Defendant JFBB.

Similarly, the relationship between Defendants Peak Resorts and JFBB is analogous to that between Defendants Jack Frost and JFBB. The relationship between Peak Resorts and JFBB is that of a Parent Corporation and a wholly-owned subsidiary. The issue a court must examine in determining if a parent corporation is liable for the acts of one of its subsidiary corporations is control. "Where a parent-subsidiary relationship is established, [the] question of which corporation has control over employee[s] . . . is determined by focusing on functions

performed by each corporation and by employee[s] in addition to other indicia of control." *Kiehl v. Action Manufacturing Co.*, 535 A.2d 571 (Pa. 1987). As stated above, the only relationship between Defendants Peak Resorts and JFBB was and is parent-subsidiary corporation. The record is devoid of any evidence that Peak Resorts exercised control over JFBB or its activities at Jack Frost Ski Resort. To the contrary, Peak Resorts in its answer states it has no control in the management or operation of Jack Frost Ski Resorts. Therefore, there are no genuine issues of material fact in regards to Peak Resorts and Jack Frost's involvement in this incident that occurred on March 13, 2009.

III. CONCLUSION

For the reasons stated above, the Court **denies** Defendants JFBB Ski Areas, Inc.'s and Anheuser-Busch, Inc.'s Summary Judgment Motions. Plaintiffs' Complaint has stated the necessary facts to place Defendants on notice of the cause of action Plaintiffs intend to pursue, and support their alternate theory of liability. Also, there remain genuine issues of material fact regarding these Defendants such that the claims against them can, at this point, be presented to a jury.

Defendants, Jack Frost Mountain Company's and Peak Resorts' Motions for Summary Judgment shall be **granted**.

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WAYNE MICHAELCHUCK AND MARY MICHAELCHUCK,	:	
Plaintiffs	:	
vs.	:	No. 10-2905
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Defendants	:	

Annette Ferrara, Esquire	Counsel for Plaintiff
Hugh M. Emory, Esquire	Counsel for Defendants
Yuri J. Brunetti, Esquire	Counsel for Defendants

ORDER OF COURT

AND NOW, to wit, this _____ day of September, 2012, upon consideration of the Motions for Summary Judgment filed by the Defendants and briefs in support thereof, the Plaintiffs' response thereto, oral argument thereon, and after reviewing the record in this matter as defined by Pennsylvania Rule of Civil Procedure 1035.1, it is hereby **ORDERED and DECREED** that:

1. Defendants' JFBB Ski Areas, Inc.'s and Anheuser-Busch, Inc.'s Motion for Summary Judgment are **DENIED; and**
2. Defendants, Jack Frost Mountain Company and Peak Resorts' Motions for Summary Judgment are **GRANTED.**

BY THE COURT:

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Joseph J. Matika, J.