SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN PART 17

Justice

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

Index Number : 109058/2004
FARONE, EGIDIO A.
VS
HUNTER MOUNTAIN SKI BOWL
Sequence Number : 002
SUMMARY JUDGMENT

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

FILED
OCT 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/2/07

J.S.C.
EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ ~~REFERENCE~~

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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EGIDIO A. FARONE,

Plaintiff,

-against-

Index No.: 109058/04

HUNTER MOUNTAIN SKI BOWL, INC. and SAMUEL C. MORRIS,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

In this action, plaintiff Egidio A. Farone (Farone) sues defendants Hunter Mountain Ski Bowl, Inc. (Hunter Mountain), a ski resort operator, and Samuel C. Morris (Morris), a skier who collided with Farone when skiing in Hunter Mountain, causing plaintiff's personal injuries. After the conclusion of extensive discovery, Hunter Mountain and Morris filed motions for summary judgment (motion sequence numbers 002 and 003 respectively) seeking a dismissal of the complaint on the basis that plaintiff assumed the risk of injury. The motions for summary judgment are consolidated herein for disposition, and for the reasons stated, are denied.

Background

Farone, 45 years old at the time of the accident, is an expert skier who has been skiing regularly since 1994. On January 17, 2004, during the Martin Luther King holiday weekend, he went skiing at Hunter Mountain with his wife. The accident

occurred during his first post-lunch downhill run. More specifically, when Farone stopped for a rest on Eisenhower (an expert trail) slightly downhill from where it intersected with Broadway (an intermediate trail) and near the right hand side of a large orange sign that said "SLOW," which was covered with snow, he was struck from behind by Morris, a 28 year old who considers himself an intermediate skier. Farone states that he stopped at this spot because it was relatively flat, and he thought it was safe because the SLOW sign indicated it was a slow skiing area. Just before the accident, Farone heard a scream coming from behind him. As he turned his head, he saw Morris the instant before he felt "an incredibly painful impact and 'heard' what sounded like a giant gong going off in my head." Farone Affidavit, ¶ 15. Farone alleges that the speed and force of the impact knocked him unconscious and caused him "substantial permanent injuries," including "a fractured scapula, a separated shoulder and multiple contusions." Farone Affidavit, ¶ 4.[1]

Photographs taken of the accident scene by Hunter Mountain's personnel reveal that the "SLOW" sign and certain warning signs at the top of Eisenhower, including the black diamond (difficult trail warning) and the triangular (trail caution) signs, were

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[1] In his deposition, Farone testified that in July 1998 he had arthroscopic surgery on his right shoulder, which had "healed very well," and that he had no other procedures performed on his right shoulder since that surgery and the date of the accident. Farone Deposition, pages 8-11.

covered with snow at the time of the accident. Morris testified that he did not see the SLOW sign prior to the accident (Morris Deposition, p. 41). However, he states that the accident occurred because he had to make a quick maneuver to avoid skiers who abruptly cut in front of him, and in doing so, he lost balance on an icy patch, which caused him to collide with Farone. Morris Affidavit, ¶ 6. Morris also testified that the collision occurred about 2 P.M., on his second downhill run after a lunch consisting of a cheeseburger, french fries and two beers.

The complaint asserts a negligence cause of action against both defendants. As against Hunter Mountain, the complaint alleges that the resort operator, among other things, failed to make conditions as safe as they appeared to be, including the failure to clear snow off the warning signs, as well as the sale of alcohol to skiers knowing that alcohol consumption adversely affects judgment and coordination, which allegedly proximately caused the accident and Farone's injuries. As against Morris, the complaint alleges, among other things, that he was negligent and reckless in skiing while intoxicated or judgment impaired, and that he was skiing at an excessive speed and in violation of the "Safety in Skiing Code," which caused the accident and injuries.

Both defendants deny the allegations, and counter that Farone assumed the risk inherent in skiing, including collision

with other skiers, which precludes his recovery for injuries that are potential consequences of his voluntary participation in such activity. In such regard, both defendants move for summary judgment in their favor, basing their argument on the legal doctrine of assumption of risk.

Discussion

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]}, the following:

> As we have stated frequently, the 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. Failure to make such ... showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the guidance of the Court of Appeals, the lower courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief should be granted or denied. *See, e.g., Giandana v Providence Rest Nursing Home,* 32 AD3d 126, 148 (1st Dept 2006) (because summary judgment "deprives the litigant of his day in court, it is considered a drastic remedy which should only be

employed when there is no doubt as to the absence of triable issues")(citations omitted); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997)(in considering a motion for summary judgment, "evidence should be analyzed in the light most favorable to the party opposing the motion")(citations omitted). However, general allegations of a conclusory nature that are unsupported by competent evidence are insufficient to defeat a motion for summary judgment. *Alvarez*, 68 NY2d at 324-325.

Assumption of Risk

In the context of analyzing the assumption of risk doctrine in *Morgan v State of New York*, (90 NY2d 471 [1997]), the Court of Appeals explained the duty of care owed by owners or operators of athletic facilities to voluntary participants who were injured on premises while engaging in sports activities. Specifically, the Court of Appeals pointed out the following:

> One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball * * * A different case would be here if the *dangers inherent in the sport were obscure or unobserved*, or so serious as to justify the belief that precaution of some kind must have been taken to avert them [citations omitted].

Id. at 482-483 (emphasis in original). The Court of Appeals stated that the facility owner or operator is relieved of liability if the consenting sports participant "is aware of the

risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks." *Id.* at 484 (citations omitted).

In this case, the allegation that Hunter Mountain's sale of alcohol to Morris (consisting of two beers) proximately caused plaintiff's injury is unsupported. First, the sale of alcohol at Hunter Mountain is authorized by the State Liquor Authority, and it is uncontested that many ski resorts and other sporting facilities commonly sell alcohol to patrons. Plaintiff has not asserted any Dram Shop Act liability, as there is no allegation that Hunter Mountain served alcohol to a visibly intoxicated person. Moreover, plaintiff has not alleged any indicia of alcohol consumption at the time of the accident. Indeed, it appears that the allegation that Morris was judgment-impaired is based solely on Morris' admission that he drank two beers at the ski lodge during lunch. In such regard, as noted by this court's decision dated May 15, 2006, which denied plaintiff's motion for discovery of the amount of revenue received by Hunter Mountain from the sale of alcohol: "although Plaintiff points to Defendant Morris' admission that he consumed two beers prior to skiing, Plaintiff has not demonstrated that the information sought is relevant to any failure by Hunter Mountain to exercise due care in preventing the collision between Plaintiff and Defendant Morris."

Further, plaintiff's claim that he did not know that Hunter

Mountain served alcohol to skiers during active ski hours, and had he known of this he would not have skied, is without merit. While arguably alcohol should be banned under certain circumstances, that is not the state of the law. Plaintiff's failure to observe the sale of alcohol at Hunter Mountain, which was open and readily observable, does not support plaintiff's claim that Hunter Mountain should inform patrons of the risks of alcohol consumption, and its failure to do so "negligently created a non-inherent risk to Plaintiff that enhanced the risk of the Accident by virtue of serving Morris ... beer during lunch." Plaintiff's Brief, p. 12. Further, as explained below, plaintiff has not presented sufficient credible evidence that Morris was alcohol impaired at the time of the accident.

In support of the allegation that Morris was impaired when the accident occurred, plaintiff submits the affidavit of Jesse Bidanset, a toxicologist.[2] Using a software program called "EZ-ALC" and the following assumptions (to wit: Morris' weight was 180 pounds; the amount of beer he consumed was 40 ounces; and the time lapse from his beer, cheeseburger and fries consumption to the accident was about two hours), Bidanset opined that Morris'

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[2] Documents submitted by Hunter Mountain indicate that in December 2006, the New York Office of the Attorney General imposed a civil penalty against Bidanset for operating a clinical laboratory without the required certification from the Department of Health authorizing him to perform forensic toxicology testing. Reply Affidavit of Carol Schrager, Exhibit Q.

blood alcohol level (BAC) was about 0.04% at the time of the accident, and such level negatively affected his alertness, cognitive response and judgment (Bidanset Affidavit).

The Bidanset Affidavit is not sufficient to defeat summary judgment. New York law provides that a person with a BAC of 0.05% or lower is prima facie evidence that such person's ability to drive a car is not impaired by alcohol.[3] Moreover, it is "well known that the effects of alcohol consumption may differ greatly from person to person" and that "tolerance for alcohol is subject to wide individual variation." *Romano v Stanley*, 90 NY2d 444, 450 (1997) (citations omitted). Further, the report is based on the assumption that Morris consumed 40 ounces of beer, instead of 34 ounces of beer, as maintained by defendants.[4]

However, besides the alcohol impairment argument, plaintiff also argues that the assumption of risk defense does not apply to Hunter Mountain because, among other things, it failed to clear the snow off the "SLOW" sign and other warning signs near the

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[3] Under New York Law, evidence that BAC is 0.05% or less in a person is "prima facie evidence that the ability of such person to operate a motor vehicle was not impaired by the consumption of alcohol, and that such person was not in an intoxicated condition." Vehicle and Traffic Law, § 1195(2)(a).

[4] Hunter Mountain's food and beverage director, David Kukle, testified that 20 and 12 ounces cups were used, and they were typically filled with 17 and 9 ounces of liquid, respectively. Kukle Deposition, p. 14. Assuming Morris took the larger size serving cup for both drinks, he may have consumed 34 ounces of beer.

site of the accident, i.e., where the Eisenhower and Broadway trails intersected. The photos submitted by plaintiff depict that the Blaze Orange SLOW sign has snow covering all letters except the "S" and the Black Diamond trial sign and Caution symbol near the SLOW sign appears totally obscured. Hunter has presented no reason as to why the signs were not cleared on the sunny and clear day of the accident. Using Hunter Mountain's own Ski Patrol and Training Guide, specifically the portion entitled "Morning Run Procedures," plaintiff points out that the ski patrols were required to make sure, prior to the opening of the resort in the morning and throughout the day, that "all signage [at the top of all trails] is clearly readable, in good repair, and free of snow and ice." Michael Bucci Affirmation, Exhibit B, Morning Run Procedures, ¶ C. Thus, plaintiff asserts that Hunter Mountain breached its duty to maintain the safety of its premises by failing to make sure that all signage be free of snow, which was a proximate cause of the accident and his injuries.

Hunter Mountain counters that downhill skiing entails the inherent risk of collision with other skiers,[5] and Farone was aware of the risk as he is an expert skier, but voluntarily chose to participate in such activity. Hunter Mountain asserts that Morris' collision with Farone was an accident that is an inherent

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[5] General Obligations Law § 18-101 et seq. states that voluntary participants in downhill skiing assume the inherent risk of personal injury caused by other skiers.

risk of the sport, and that neither clearing snow off the warning signs nor placing ski patrols near such signs to monitor skiers could have avoided the "split-second" accident, there was "no causal link" between the alleged negligence and the accident. Hunter Mountain Reply Brief, p. 5. Hunter Mountain cites to various cases for the proposition that, "as a matter of law, a ski area operator has no duty to alter or eliminate the inherent risks of the sport." *Id.* at 28. *See e.g. Kaufman v Hunter Mountain Ski Bowl, Inc.*, 240 AD2d 371 (2d Dept 1997)(risk of collision with skiers is inherent in the sport, plaintiff's claim was dismissed even though his injury was caused by collision with the ski patrol); *Bruno v Hunter Mountain Ski Bowl, Inc.*, 248 AD2d 660 (2d Dept 1998)(plaintiff assumed the risk that caused her injury because she was aware of the use of snow-making equipment and the plume produced by it could impair her vision, but she chose to ski past such equipment, which momentarily blinded her and caused her to lose balance and hit a rock wall); *Lapinski v Hunter Mountain Ski Bowl, Inc.*, 306 AD2d 320 (2d Dept 2003)(court found that the un-obscured warning signs at the intersection of Eisenhower and Broadway were clear, adequate and complied with law, and that plaintiff's injury was caused by his own inadvertence when he veered off from the intermediate trail onto the expert trail).

The cases cited by Hunter Mountain are distinguishable.

Unlike the cited cases where the plaintiffs were actively engaged in the sports of skiing when the accident occurred, Farone was simply resting at the SLOW sign when he was struck by Morris, who testified that he did not see the sign, which was obscured by snow. Although persons who participate in sports are deemed to have consented to the risks of injury that are known, apparent or reasonably foreseeable consequences of such participation, they are "not deemed to have assumed the risks of ... concealed or unreasonably increased risks." *Morgan v State of New York*, 90 NY2d at 484 (internal citations omitted) (plaintiff should not be deemed to have assumed the risk of injury when he tripped over a torn tennis net, which was not an inherent part of the tennis game).

In this case, Hunter Mountain's own operating procedures require, among other things, that its ski patrols make sure that all trail signage be "clearly readable" and "free of snow and ice." Further, under General Obligations Law § 18-103 (2), ski area operators must "post in a location likely to be seen by all skiers signs of such size and color as will enable skiers to have knowledge of their responsibilities under this article." The erected SLOW sign at the Eisenhower-Broadway junction is intended to serve as a "visual aid" to warn "an intermediate skier [such as Morris] who may be coming down Broadway [that he is] entering an expert slope [Eisenhower] too fast" and that he "may want to

slow down." Ward Deposition, p. 47.[6] Because the SLOW sign was covered with snow, and Morris testified that he did not notice or see the sign, a triable issue is raised as to whether the failure of Hunter Mountain - a ski area operator with a duty to maintain the safety of its premises and to post clearly legible signs to warn skiers of their responsibility - to remove snow from the SLOW sign and other nearby warning signs was a proximate cause of the accident.

Hunter Mountain argues, however, that the applicable signage regulations, as contained in "Table 1" of 12 NYCRR Part 54, do not even require "slow" signs, and its failure to remove snow from the SLOW sign is thus not a violation of the law. Hunter Mountain relies on *Hyland v State of New York*, (300 AD2d 794 [3rd Dept 2002]), for the proposition that a ski area operator is not liable, based on the assumption of risk doctrine, for injuries of a skier who had been advised that the trails were of "spring conditions" (i.e., presence of bare spots and thin cover on trails) when only some, but not all, bare spots on the ski trails were marked with bamboo warning posts.

Such argument is unpersuasive. Although "Table 1" of the statute does not require that a warning sign be specifically labeled as "SLOW," it does require that some warning signs be colored "Blaze Orange," and the subject "SLOW" sign is "Blaze

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[6] James Ward is the ski patrol director of Hunter Mountain.

Orange." Also, the SLOW sign is intended, as stated in Ward's deposition, to warn intermediate skiers to slow down as they approach an intersection with an expert trail. Any argument that a warning sign need not be maintained so that it is clearly visible, because such sign may not be specifically mandated by law is to ignore the intent the law, which is to regulate the conduct of skiers and ski area operators so as "to minimize the risk of injury to persons engaged in the sport of downhill skiing and [to] promote safety in the downhill ski industry." 12 NYCRR § 54.2. Moreover, the courts have held that statutory duties imposed on ski area operators under the Safety in Skiing Code (i.e., 12 NYCRR Part 54) are "not exclusive and common-law principles must be applied unless a particular hazardous condition is specifically addressed by the statute." *Sharrow v New York State Olympic Regional Development Authority*, 193 Misc 2d 20, 35 (Ct of Claims 2002), *affd*, 307 AD2d 605, 608 (3d Dept 2003)(affirming lower court's ruling that defendant failed to satisfy its common-law duty to adequately warn of the danger posed by certain trail conditions); *Sytner v State of New York*, 223 AD2d 140, 144 (3d Dept 1996)(where "neither the statute nor the accompanying regulations specifically contemplate or address the particular hazard ... it cannot be said that [defendant] satisfied its common-law duty to make the conditions as safe as they appeared"). *See also Curtis v Town of Inlet*, 32 AD3d 1311

(4th Dept 2006)(reversing the grant of summary judgment in favor of defendant, because issues of fact existed as to plaintiff's training as well as to whether the signage erected by defendant was sufficient to satisfy the common-law duty to make the snowmobile trail conditions as safe as they appeared to be).

Accordingly, summary judgment cannot be granted in favor of Hunter Mountain.[7]

With respect to plaintiff's claim that Morris' conduct was negligent, Morris echoes Hunter Mountain's defense that Farone assumed the risk of injury from collision with another skier, an inherent risk in skiing. Morris asserts that, under the standard set forth by the Court of Appeals in *Morgan (supra)*, he is liable to Farone only if there is evidence showing that he engaged in "reckless or intentional conduct." Morris Reply Brief, p. 10. He also asserts that the accident happened simply because he tried to avoid three skiers who suddenly cut in front of him, and in so doing he hit a patch of ice, which caused him to lose his balance and collide with Farone. Thus, he argues that there is "no evidence of reckless behavior in this case. Indeed, there is no evidence of negligent behavior." *Id.* at p. 12.

Morris' summation of what was actually stated in *Morgan* is

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[7] In such regard, it is unnecessary for the court to address other disputed issues raised by the parties, including, whether the SLOW and other warning signs were properly placed, whether ski patrols should be posted at such signs, and whether Morris should be "educated" by Hunter Mountain after the accident.

incomplete. More specifically, the Court of Appeals stated that a "counterweight to ... the assumption of risk doctrine is that participants will not be deemed to have assumed the risks of reckless or intentional conduct ... or concealed or unreasonably increased risk." 90 NY2d at 485 (emphasis added)(internal citations omitted). In other words, if a defendant's conduct is reckless or intentional, or if the conduct unreasonably increased the risk of injury where such risk is not inherent in the sport itself, the defendant may be held liable for causing plaintiff's injury. *See also Whitman v Zeidman*, 16 AD3d 197, 197 (1st Dept 2005)(the standard is "reckless, intentional or other risk-enhancing conduct not inherent in snowboarding that might have caused the accident"); *Ross v New York Quarterly Meeting of the Religious Society of Friend*, 32 AD3d 251, 252 (1st Dept 2006) (denying defendant's summary judgment motion because there is an issue of fact as to whether "the coach unreasonably increased the risks of the exercise [and injury]" by directing the plaintiff to slide on hardwood floor while wearing sneakers, which would have generated greater friction and enhanced the risk of accident occurring).[8]

In this case, plaintiff alleges that the conduct of Morris enhanced the risk of the accident. For instance, plaintiff

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[8] Compare *Duncan v Kelly* (249 AD2d 802 [3rd Dept 1998])(using an ordinary negligence standard) with *DeAngelis v Protopopescu* (37 AD3d 1178 [4th Dept 2007])(using a recklessness standard).

asserts that Morris violated certain provisions of the Skier Responsibility Code and the Hunter Mountain's Reckless Skiing Policy[9] by, among other things, failing to stay in control of his speed and course; being unable to stop or avoid colliding with other skiers; failing to yield the right of way to plaintiff; failing to observe the SLOW sign and to ski slowly; and failing to familiarize himself with trail information at Hunter Mountain or carry a trail map. Plaintiff also alleges that Morris was skiing at an excessive speed just prior to the accident. The allegation is based on an affidavit of George Unis, an orthopedic surgeon (Unis Affidavit), who stated that Farone's injuries (consisting of a separated right shoulder, a fractured scapula, bruised ribs with multiple contusions) were "usually caused by some high-energy or high-impact trauma." Unis Affidavit, ¶ 7. Based on the extent of such injuries, the Unis Affidavit concluded that Morris was moving at a "very high rate of speed" when he collided with Farone, which was a proximate cause of Farone's injuries. *Id.*

In his affidavit, Morris stated that just before the accident, he was skiing "at a speed that was faster than walking but slower than running," and that he was about 25 feet behind Farone, who was facing downhill. Morris Affidavit, ¶ 6-7. He

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[9] Copies of the Skier Responsibility Code and the Hunter Mountain Reckless Skiing Policy are annexed as Exhibits H and I, respectively, to the Michael Bucci Affirmation.

also stated that he was "aware of no witness to the accident other than myself and Dr. Farone." However, Morris' assertion that he was "skiing under control" (Morris Affidavit, ¶ 8) is neither corroborated nor disputed by any witness, because he struck Farone from behind, the impact of which knocked Farone unconscious.

The record of this case reflects, as Morris testified, that he did not see the "SLOW" sign prior to the accident (Morris Deposition, p. 41); that he does not use trail maps when he skis, and was skiing alone by himself (instead of with his friends who are familiar with Hunter Mountain's trails) when the accident happened (Morris Deposition, p. 38-40); and that he was unable to stay in control, as he was "off balance," allegedly due to hitting an icy patch when he tried to avoid other skiers, before he collided with Farone (Morris Deposition, p. 160). Although Morris' alleged failure to comply with the skiing code and policy does not necessarily mean such failure was the proximate cause of the accident, any such failure, when combined with the evidence supporting a determination that Morris, not an expert skier, was skiing at a very high speed prior to the accident, raises an issue as to whether his conduct was a proximate cause of the accident. Accordingly, summary judgment cannot be granted in favor of Morris. *See Duncan v Kelly*, 249 AD2d 802 (3rd Dept 1998) (affirming the denial of defendant skier's motion for

summary judgment, where plaintiff skier did not see defendant because he was struck by defendant from behind, and the impact caused plaintiff significant injuries); *Martin v Luther*, 227 AD2d 859 (3rd Dept 1996) (issue of fact as to whether defendant was skiing recklessly, or was skiing under control until his ski was caught in a rut, precluded summary judgment where plaintiff was struck by defendant from behind and sustained injuries).

Accordingly, it is

ORDERED that the motions for summary judgment of Hunter Mountain Ski Bowl, Inc. (Motion Sequence Number 2) and Samuel C. Morris (Motion Sequence Number 3) are denied; and it is further

ORDERED that the parties appear before Judge Emily Jane Goodman on December 3, 2007 for settlement conference, or, if the case does not settle, the parties shall immediately pick a jury with the trial to start on December 4, 2007.

This constitutes the Decision and Order of the court.

Dated: October 2, 2007

ENTER:

J.S.C.

EMILY JANE GOODMAN