SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

RICHARD TORO and LIDIA LAGOS,

Plaintiff(s),

-against-

NEW YORK RACING ASSOCIATION, INC. a/k/a NYRA, VOLUME SERVICES AMERICA, INC., d/b/a CENTERPLATE MANAGEMENT, INC., VOLUME SERVICES, INC. and SECURITAS SECURITY SERVICES USA, INC. a/k/a PINKERTON,

Defendant(s).

MOTION #001,002,003
INDEX #12084/05
MOTION DATE:
February 25 2011

NEW YORK RACING ASSOCIATION, INC.,

Third-Party Plaintiff,

-against-

THE WACKENHUT CORPORATION,

Third-Party Defendant.

The following papers read on this motion:

Notice of Motion (Defendant)..... 1
Notice of Motion (Third-Party Defendant)..... 1
Notice of Cross-Motion/Affirmation in Opposition (Plaintiff)..... 1
Affirmation in Opposition to Cross-Motion..... 1
Reply Affirmations..... 4

Upon the foregoing papers, it is ordered that defendants' motion for summary judgment, third-party defendants' motion for summary judgment, and plaintiffs' cross-motion opposing defendants' and third-party defendant's respective motions for summary judgment and seeking summary judgment for plaintiff on the issue of liability against the defendant, are determined as hereinafter set forth.

The instant applications arise out of an accident on or about August 9, 2002, when plaintiff Richard Toro, a horse trainer, was thrown off a horse, stepped on by that horse, and thus injured during a training session at Saratoga Race Track. The injury occurred when surrounding activity, namely the opening of an umbrella in the nearby picnic area by a concession worker employed by defendant Volume Services America, Inc. (d/b/a Centerplate Management, Inc.), as well as the existence of patrons in the same picnic area, scared the horse. Plaintiff seeks damages against the New York Racing Association, Inc. (NYRA) as the franchise holder, and against Centerplate. Defendants NYRA and Centerplate have brought a third-party claim against The Wackenhut Corporation. Defendants NYRA and Centerplate seek summary judgment against the plaintiff, and third-party defendant Wackenhut seeks summary judgment against defendants NYRA and Centerplate as well as the plaintiff. The plaintiff has cross-moved for summary judgment against defendants NYRA and Centerplate, and in opposition to third-party defendant Wackenhut's motion for summary judgment. Plaintiff Lidia Lagos and defendant Securitas Security Services USA, Inc. (a/k/a Pinkerton) have both since been removed from the present action.

In support of their motion, defendants NYRA and Centerplate argue that the plaintiff is barred from recovery because he assumed the risk of injury inherent in the sport of horse racing, and that plaintiff was aware of the routine setup of the picnic area beside the track that has been known to scare horses, but still proceeded to ride the horse despite this knowledge.

In support of its motion, third-party defendant Wackenhut submits the contractual agreement between Wackenhut and NYRA for security services to be performed by Wackenhut for NYRA at the race track. This agreement includes a clause indemnifying NYRA from any claims as a result of a failure by Wackenhut to perform under the terms of the contract. The third-party defendant argues that plaintiff is barred from recovery because he assumed the risk of injury inherent in the sport of horse racing and proceeded to train near the picnic area despite his knowledge that activity in that area is known to excite the horses on the track at Saratoga. The third-party defendant also argues that it did not negligently breach its contract to provide security services for defendant NYRA because it did not have authority to control or supervise the plaintiff or the concession workers in the

picnic area as it was not contractually obligated to do so, and thus is under no obligation to indemnify NYRA from the present cause of action.

In support of his motion, plaintiff argues that the doctrine of primary assumption of risk is inapplicable to the present action because the defendants' and third-party defendant's failure to stop people from entering the picnic area or prevent concession workers from setting up umbrellas led to a dangerous condition and unreasonably increased risks to the plaintiff beyond the ordinary risks inherent in horse riding. Plaintiff argues that third-party defendant Wackenhut, based on its contract with NYRA, had an affirmative duty to reasonably protect all persons, including plaintiff, within the race track grounds, and failed to fulfill that duty. Plaintiff argues that defendants NYRA and Centerplate were responsible for providing safe premises and safe concession areas, but instead negligently created dangerous conditions in and around the picnic area by placing the picnic area so close to the track in the first place, and allowing people to enter and allowing concession workers to set up during training hours, all while fully aware that horses are often scared by nearby activity in that area and can thus injure their riders.

"That doctrine provides that a voluntary participant in a sporting or recreational activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v. State of New York*, 90 NY2d 471, 484, 685 NE2d 202, 662 NYS2d 421 [1997]). "This includes those risks associated with the construction of the playing surface and any open and obvious condition on it (see [*3] *Sykes v. County of Erie*, 94 NY2d 912, 728 NE2d 973, 707 NYS2d 374; *Maddox v. City of New York*, 66 NY2d 270, 487 NE2d 553, 496 NYS2d 726)" (*Welch v. Board of Educ. Of City of N.Y.*, 272 AD2d 469, 469, 707 NYS2d 506 [2000] [emphasis supplied]). Morever, it is not necessary to the application of the doctrine that the injured plaintiff may have foreseen the exact manner in which the injury occurred "so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (*Maddox v. City of New York*, 66 NY2d 270, 278, 487 NE2d 553, 496 NYS2d 726 [1985]). Of course, awareness of the risk is "to be assessed against the background of the skill and experience of the particular plaintiff" (id.; see *Morgan v. State of New York*, supra at 486). Additionally, while participants in such an activity are not deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risk (see *Morgan v. State of New York*, supra at 485), "[i]f the risks of the activity are fully comprehended or perfectly obvious, [the] plaintiff has consented to them and [the] defendant has [***529] performed its duty" by making the conditions as safe as they appear to be (*Turcotte v. Fell*, 68 NY2d 432,

439, 502 NE2d 964, 510 NYS2d 49 [1986]; see *Marshall v. City of New Rochelle*, 15 AD3d 456, 790 NYS2d 504 [2005]; *Restaino v. Yonkers Bd. Of Educ.*, 13 AD3d 432, 785 NYS2d 711 [2004]; *Dobert v. State of New York*, 8 AD3d 873, 779 NYS2d 143 [2004]; *Vecchione v. Middle Country Cent. School Dist.*, 300 AD2d 471, 752 NYS2d 82 [2002]; *Verro v. New York Racing Assn.*, 142 Ad2d 396, 536 NYS2d 262 [1989])."

In the instant matter, the Court finds that genuine questions of fact exist as to preclude summary judgment for any party on the issue of assumption of risk. As such, defendants NYRA and Centerplate's respective motion for summary judgment and third-party defendant Wackenhut's motion for summary judgment against the plaintiff are denied, and plaintiffs' cross-motion for summary judgment is also denied. Furthermore, questions of fact exist as to third-party defendant Wackenhut's contractual duties to defendant NYRA. As such, third-party defendant's respective motion for summary judgment on this issue is also denied.

Dated: JUN 30 2011

J.S.C.