

**Nicolette Garden Cumins v Zale Corp.**

2012 NY Slip Op 30085(U)

January 9, 2012

Supreme Court, New York County

Docket Number: 108700/07

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

NICOLETTE GARDEN CUMINS, by her mother  
and Natural Guardian, JANICE CUMINS,  
and JANICE CUMINS, Individually,  
Plaintiff,

Index No.: 108700/07

Motion Date: 08/30/11

Motion Seq. No.: 03

Motion Cal. No.: \_\_\_\_\_

- v -

ZALE CORPORATION and PIERCING PAGODA,  
Defendants.

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause -Affidavits -Exhibits \_\_\_\_\_

1

Answering Affidavits - Exhibits \_\_\_\_\_

2

Replying Affidavits - Exhibits \_\_\_\_\_

**FILED**

Cross-Motion:  Yes  No

JAN 17 2012

Upon the foregoing papers,

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Defendants Zale Corporation (Zale) and Piercing Pagoda  
(Pagoda) move, pursuant to CPLR 3212, for summary judgment in  
their favor.

Plaintiff Janice Cumins (Cumins), the mother and natural  
guardian of the infant plaintiff, Nicolette Garden Cumins  
(Nicolette), commenced this action to recover for personal  
injuries allegedly sustained by Nicolette, as a result of ear  
piercings done by defendants on March 8, 2006 (the March 2006

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

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

[\* 2]

Piercing), and on November 9, 2006 (the November 2006 Piercing), at a Pagoda store located in the Smith Haven Mall in Lake Grove, New York. Nicolette, a child with special needs, was four years old at the time of the alleged piercings. In her deposition, Cumins testified, that the March 2006 Piercing resulted in improper healing, redness and bleeding of Nicolette's ears and that when a Pagoda manager saw the condition of Nicolette's ears, she recommended that the earrings be removed to allow to healing before a second piercing was attempted. Cumins received a refund for the amount she paid for this piercing. Cumins further testified that the November 2006 Piercing led to redness, puffiness and the formation of a blister over the hole of Nicolette's right ear. Plaintiffs claim that, because of defendants' negligent performance of the piercings on Nicolette, she sustained scar tissue on her left ear, an improperly placed earring hole in the right ear, external ear pain and the necessity of surgery for ear correction.

In support of their application, defendants initially argue that plaintiffs fail to establish a prima facie case of negligence with respect to the March 8, 2006 Piercing, claiming there is no evidence, other than Cumins' testimony, that Nicolette had an ear piercing on that day. Defendants maintain that the deposition of Carolyn Havens (Havens), Pagoda's regional director of stores in New Jersey and New York, reflects that

that a search was done by Pagoda of their records, which did not reveal any records, specifically a Standard Release and Authorization Form, in connection with the March 2006 Piercing. Additionally, they claim that Cumins herself did not provide the alleged credit card receipt for the first piercing, or evidence that she received a refund for the first piercing charge, as she testified.

Entitlement to summary judgment based on a search which purportedly reveals no basis for liability requires defendants to cite to material facts from individuals having knowledge of the search (Demposey v Intercontinental Hotel Corp., 126 AD2d 477 [1st Dept 1987]). Here, in the deposition relied on by defendants, Havens testified that Pagoda issues a document, which contains a Standard Release and Authorization Form on the left-side, and a register receipt confirming an ear piercing occurrence on the right side and that these documents are kept at the store for a year before being transferred to a store support center in Texas. Havens stated that she did not know why the Standard Release and Authorization Form from the March 2006 Piercing was not produced and, when asked "why there might not be a receipt of [this ear piercing] other than possible clerical error," she responded "if there isn't a receipt, it would indicate that she didn't have her ears pierced at our store." While her deposition reflects that a search was made of Pagoda's records, it fails to indicate who

performed the search for the Standard Release and Authorization Form in connection with the March 2006 Piercing, and what efforts were made in conducting such search. Thus, her conclusions regarding the search are conclusory, and her testimony is devoid of the necessary detail and knowledge needed to support a basis for concluding that the absence of this document establishes that an ear piercing was not performed on Nicolette on March 6, 2006 (see Dempsey v Intercontinental Hotel Corp., 126 AD2d 477, 479 supra; see also Rodriguez v United Bronx Parents, Inc., 70 AD3d 492 [1st Dept 2010]). Further, defendants' argument is contradicted by Cumins' testimony that describes in great detail the March 2006 Piercing by Pagoda employees (Barraillier v City of New York, 12 AD3d 168 [1st Dept 2004]). Additionally, Cumins' failure to produce a credit card receipt or proof of refund in connection with the March 2006 Piercing does not, in of itself, support defendants' argument, particularly in light of her testimony that she had to give back her receipt to Pagoda's manager when she received the refund. Thus, the record sufficiently raises a question of fact as to whether the March 2006 Piercing occurred, and defendants fail to demonstrate their entitlement to summary judgment on that basis.

Alternatively, defendants argue that plaintiffs' negligence claims are barred, pursuant to the doctrine of waiver and release, based upon the "express agreement not to sue for injury

or loss" as set forth in the Standard Release and Authorization form. Relying on the depositions of Haven and Amanda Bello (Bello), a Pagoda Key Sales Associate, they maintain that, when a piercing is done, the aforementioned form is given to each customer to complete, together with written after care instructions. Defendants also note that, during her deposition, Cumins admitted to receiving the written after care instructions on March 6, 2006, and to signing the Standard Release and Authorization form and receiving the written after care instructions on November 9, 2006.

Plaintiffs oppose this branch of defendants' application, arguing that the release contained in the Standard Release and Authorization form is invalid under the facts of this case, because: (1) a minor could not be bound by a release executed by her parent, and (2) exculpatory clauses that immunize a party from liability for its own misconduct are disfavored by law.

A review of the Standard Release and Authorization form, which Cumins acknowledged having signed at the time of the November 2006 Piercing, provides, in pertinent part, as follows: "I agree to release and hold Piercing Pagoda, its employees, Inverness and Studex harmless from any and all actions and liability resulting from or relating to this ear piercing." As argued by plaintiffs, an infant is not bound by a release signed by his or her parents (Castro v Boulevard Hosp., 106 AD2d 539 [2d

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Dept 1984]; see also 67 NY Jur 2d, Infants and Other Persons Under Legal Disability, § 11). Further, agreements which purport to exculpate a party from liability for its own negligence are not favored by the law, and are subjected to close judicial scrutiny (Rosenthal v Bologna, 211 AD2d 436 [1st Dept 1995]; Ash v New York Univ. Dental Ctr., 164 AD2d 366 [1st Dept 1990]).

Exculpatory provisions "are strictly construed against the party relying on them and must be unambiguously expressed in unmistakable language that is clear and explicit in communicating the intention to absolve from negligence the party seeking to be insulated from liability" (Ash v New York Univ. Dental Ctr., 164 AD2d at 368, supra; see also Edge Mgt. Consulting, Inc. v Blank, 25 AD3d 364 [1st Dept], lv dismissed 7 NY3d 864 [2006]). "[I]t must appear plainly and precisely that the 'limitation of liability extends to negligence or other fault of the party attempting to shed his ordinary responsibility'" (Gross v Sweet, 49 NY2d 102, 107 [1979], quoting Howard v Handler Bros. & Winell, 279 App Div 72, 75-76 [1st Dept 1951], affd 303 NY 990 [1952]).

Exculpatory provisions using broad sweeping language "to release from 'any and all responsibility or liability of any nature whatsoever for any ... personal injury'" do not bar negligence claims (Trummer v Niewisch, 17 AD3d 349, 349-350 [2d Dept], lv denied 5 NY3d 712 [2005], quoting Gross v Sweet, 49 NY2d at 108-109). A review of the language of the Standard Release and

Authorization form discloses that it is written in broad and sweeping terms, and, thus, fails to meet the stringent standard requiring, in unequivocal stated terms, that it was the parties' intention to insulate the defendants from liability for Nicolette's injuries caused by their own negligence (Trummer v Niewisch, 17 AD3d 349, *supra*; Gross v Sweet, 49 NY2d 102, *supra*). Therefore, plaintiffs' negligence claims are not barred by the purported exculpatory language contained in the Standard Release and Authorization and defendants fail to demonstrate their entitlement to summary judgment on the grounds of waiver and release.

Lastly, defendants claim that plaintiffs cannot establish a prima facie case of negligence against them. To establish a prima facie case of negligence, a plaintiff must demonstrate (1) the defendants owed a duty of reasonable care to the plaintiff, (2) a breach of that duty, and (3) that such breach was a proximate cause of injury to the plaintiff (Solomon v City of New York, 66 NY2d 1026 [1985]). While defendants do not dispute that they had a duty to Nicolette, they argue that plaintiff cannot establish that they breached their duty, or failed to act with reasonable care. The evidence relied on by defendants, consisting of the parties' respective depositions fails to establish that there are no triable issues of fact as to whether defendants were negligent in connection with the two piercings.

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While there is testimony by Havens and Bello as to the training procedure at the time of hire of their employees and the refresher training program done each year, the record is devoid of any proof as to whether the individuals working at Pagoda on the dates of the piercing had received such training. Further, although there is testimony by Cumins approving the locations of the markings on Nicolette's ears before they were pierced, she also testified that, during the March 2006 Piercing, she relied on the purported professionalism of Pagoda's employees as to the markings. With respect to the November 2006 Piercing, she testified that she had just taken Nicolette to her physician, who had marked Nicolette's ears for the piercing, and indicated that the markings should be followed. Cumins further stated that Pagoda's employee indicated that the marking on the right ear should be in a different location, and suggested that it "be moved over the slightest bit." Cumins said that it was not until she changed Nicolette's earrings that she saw that the earring on the right ear looked lower than the left, and that there were two holes in the right ear right next to each other. In viewing the evidence in the light most favorable to plaintiffs, as the court must on a defendant's motion for summary judgment (see Branham v Lowes Orpheum Cinemas, Inc., 8 NY3d 931 [2007]), defendants failed to meet their burden of proof as there are triable issues of fact, which requires the denial of defendants' motion for

summary judgment (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, supra). Thus, defendants' motion for summary judgment shall be denied in its entirety.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is DENIED; and it is further

ORDERED that the parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York for a pre-trial conference on February 14, 2012 at 2:30 P.M.

**FILED**

This is the decision and order of the court.

JAN 17 2012

Dated: January 9, 2012

ENTER:

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~~Debra A. James~~  
J.S.C.  
**DEBRA A. JAMES**