

<b>Nossov v Hunter Mtn. and Hunter Mtn. Resort, LLC</b>
2019 NY Slip Op 30552(U)
February 28, 2019
Supreme Court, Kings County
Docket Number: 504324/2016
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 28<sup>th</sup> day of February, 2019.

**PRESENT: HON. LOREN BAILY-SCHIFFMAN**  
JUSTICE

BORIS NOSSOV,  
Plaintiff,  
- against -

HUNTER MOUNTAIN AND HUNTER MOUNTAIN RESORT,  
LLC, and  
HUNTER MOUNTAIN SKI BOWL INC. d/b/a HUNTER  
MOUNTAIN  
Defendants.

Index No.: 504324/2016

Motion Seq. # 4 and 5

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2

Upon the foregoing papers Plaintiff, Boris Nossov ("Plaintiff"), moves this Court for an Order (a) pursuant to CPLR § 3211(b) striking the sixth and ninth affirmative defenses as asserted in Hunter Mountain Ski Bowl Inc. d/b/a Hunter Mountain's ("HMSB") Answer to the Amended Complaint; (b) striking Defendant's Demand to Change Venue to Greene County, New York; and (c) for such other and further relief as this Court may deem just and proper. HMSB cross moves this Court for an Order (a) granting its cross-motion to change venue from Kings County to Greene County; (b) denying Plaintiff's motion to strike the two affirmative defenses at issue; and (c) for such other and further relief as this Court deems just and proper.

**Background**

This is an action for personal injuries sustained by Plaintiff while attempting to board a ski lift that HSMB owned and operated, on March 27, 2014. Plaintiff obtained a lift ticket to ski at

HMSB, on March 27, 2014. At all relevant times, Plaintiff was a resident of Kings County. HSMB claims that the lift ticket it gave to Plaintiff to use in its facilities contained a binding forum selection clause that read:

YOU AGREE THAT ALL DISPUTES UNDER THIS CONTRACT AND/OR LAWSUITS ARISING FROM USE OF THE FACILITIES AT HUNTER MOUNTAIN SHALL BE LITIGATED EXCLUSIVELY IN THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF GREENE, OR IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

After reviewing the text of the lift ticket, in his sworn affidavit, Plaintiff denies that his lift ticket contained the above clause. However, in a sworn affidavit, William Snyder, the Director of Risk Management of HMSB, explains that every ticket issued by HMSB contains the above clause, and it would be impossible for Plaintiff's ticket to be missing that provision.

#### Discussion

Under CPLR § 503(a) “[e]xcept where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred.” Additionally, under CPLR § 501, a “written agreement fixing place of trial, made before an action is commenced, shall be enforced upon a motion for change of place of trial.” A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court. *Molino v Sagamore*, 105 AD3d 922, 923 (2<sup>nd</sup> Dept. 2013).

Plaintiff opposes the Demand to Change Venue on two grounds. First, Plaintiff claims his ticket did not have the forum selection clause on it. Second, Plaintiff claims that he was using a ski lift and was not skiing when he was injured. In an unreported decision, the Supreme Court of Westchester County held that a plaintiff who claimed his ski resort lift ticket did not contain the standard forum selection clause printed on all lift tickets failed to make out that claim, where defendant presented an affidavit describing that all the lift tickets had forum selection provisions. *Malebranche v Ski Windham Operating Corp., d/b/a Windham Mountain, (Sup. Ct., Westchester County, 2015. Index No.: 63274/2015)*. Additionally, in *Golden v Celebrity Cruises, Inc.*, the Appellate Term Second Department affirmed the District Court of Nassau County's decision discrediting a plaintiff's allegation that he never received materials which contained a forum selection clause for a cruise, when defendant showed the materials were mailed to the plaintiff. *4 Misc. 3d 33, 36, (Sup. Ct., Appellate Term 2<sup>nd</sup> Dept., 2004)*. Accordingly, in the instant case, Plaintiff failed to demonstrate that the lift ticket in question omitted the forum selection clause. Additionally, Plaintiff's claim that he was not skiing at the time of his injury is irrelevant. The forum selection clause applies to "LAWSUITS ARISING FROM USE OF THE FACILITIES;" skiing is not required for the clause to be operative.

Turning now to the two affirmative defenses, Plaintiff claims that the sixth affirmative defense, namely that the complaint fails to state a cause of action, and the ninth affirmative defense, namely that the action is barred by the statute of limitations, must be stricken. Plaintiff argues that because this Court did not address the two affirmative defenses in an Order dated December 6, 2018, this Court rejected both defenses. The Order in question granted Plaintiff's motion to amend the complaint to add HMSB as a defendant. This Court's failure to address the

affirmative defenses was an oversight and does not have any determinative effect. Accordingly,

it is HEREBY:

ORDERED that Plaintiff's motion to strike HMSB's Demand to Change Venue to Greene County, New York is denied; and it is further

ORDERED that HMSB's cross-motion to change venue from Kings County to Greene County, New York is granted; and it is further

ORDERED that the Kings County Clerk, upon service of a copy of this Order with Notice of Entry and payment of required fees, if any, is directed to transfer all papers filed in this action to the Green County Clerk for filing and assignment; and it is further

ORDERED that Plaintiff's motion to strike the sixth and ninth affirmative defenses is denied; and it is further

ORDERED that HMSB's cross-motion denying Plaintiff's motion to strike affirmative defenses is granted.

This is the Decision and Order of the Court.

ENTER



LOREN BAILY-SCHIFFMAN  
JSC

HON. LOREN BAILY-SCHIFFMAN

2019 MAR -4 AM 10:57  
KINGS COUNTY CLERK  
FILED