Revercomb v Aire Ancient Baths S.L.
2019 NY Slip Op 30850(U)
April 4, 2019
Supreme Court, New York County
Docket Number: 154573/2016
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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LAURA REVERCOMB,

Plaintiff,

- v -

AIRE ANCIENT BATHS S.L., *et al.*,

Defendants.

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INDEX NO. 154573/2016

MOTION DATE

MOTION SEQ. NO. 004, 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 117-171 were read on this motion for summary judgment.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 172-177 were read on this motion to strike.

Defendants Aire Ancient Baths S.L. (Aire S.L.), Acqua Ancien Bath New York, LLC (Acqua NY), Banos Arabes Grupo Aire S.L. (Banos S.L.), Acqua Ancien Bath, Inc. (Acqua Inc.) (collectively, Aire defendants) move, pursuant to CPLR 3212, for an order dismissing the complaint in its entirety (mot. seq. 4). Plaintiff opposes and cross-moves, pursuant to CPLR 3212, for an order granting her partial summary judgment against Aire defendants on the issues of duty and breach and seeks sanctions for their spoliation of evidence. Aire defendants oppose.

Aire defendants move, pursuant to CPLR 2214, for an order striking plaintiff's sur-reply (mot. seq. 5). Plaintiff opposes.

I. BACKGROUND

The CEO and Director General of the "AIRE Ancient Baths Group," states that Banos S.L. and Aire S.L. own a 90 percent interest in Acqua Inc., which owns 100 percent of Acqua NY. Acqua NY owns and operates the Aire Ancient Baths at Franklin Street (Acqua Tribeca).

Aire S.L., and "by extension, its formerly named entity," Banos S.L., do not operate Acqua Tribeca. "Acqua Ancient Baths, Inc." is a New York corporation and does not participate in the operation of the Acqua Tribeca or Acqua NY. (NYSCEF 134).

By email dated October 25, 2013, defendant Egemen Seker applied to work at Acqua Tribeca. In his application, Seker states that he studied physical education and sports management at a Turkish university and worked as a massage therapist for a professional women's basketball team in Turkey as well as at two spas in Manhattan. (NYSCEF 145).

At a deposition, Acqua Tribecca's senior massage therapist testified that in January 2014, she and the hiring executive interviewed Seker. When Seker informed them that he was not licensed as a massage therapist in New York, the therapist told the hiring executive that he could not work there, and that they could "get in trouble" for employing unlicensed massage therapists. The hiring executive responded that she would take care of it. (NYSCEF 124).

While the therapist believed that Acqua Tribeca conducted background checks, no employee handbook existed when Seker was hired in January 2014. Nonetheless, out of fear of being fired, she co-signed a "Background Investigation Release Form" signed by Seker which permitted the spa to run a background check on him (NYSCEF 147), and an "Employee Acknowledgement of Receipt of Employee Handbook" form, which Seker also signed (NYSCEF 151). Seker was then hired by Acqua Tribeca. When the therapist protested to the hiring executive about the lack of a handbook, she was told that it was being worked on. The therapist also testified about a previous incident of inappropriate touching by a massage therapist that was reported to the spa, but contended that it was committed before Seker was hired and does not recall any other incidents of inappropriate touching at the spa. She also stated that, after Seker was fired, she heard of a previous allegation involving him, but was not able to confirm it.

(NYSCEF 146).

At his deposition, Acqua Tribeca's general manager denied any knowledge of Aire defendants' policy in 2013 and 2014 about requiring massage therapists to be licensed, conducting background checks on prospective employees, or the training, supervision, or discipline of massage therapists. He was promoted to his position by the CEO and the director of marketing of the "whole corporate group." As general manager of Acqua NY, the entity that issues his paychecks, he reports directly to the CEO, who was also involved in managing the spa. (NYSCEF 126).

Seker testified at his deposition that he had shown the spa his Turkish massage therapy certificate, and as a "professional massage therapist," he knows how to place towels on a client and knows the general rules of ethics as to appropriate a masseuse's appropriate conduct. He had no recollection of seeing or signing the spa's "Acknowledgement of Training" or "Draping Policy Acknowledgement" forms (NYSCEF 149, 150), and although he did not remember receiving a handbook, he received paperwork containing an explanation of how to receive clients and commence the process of giving a massage. No complaint had been made about him in his previous jobs. (NYSCEF 127).

On February 3, 2014, a former client of Aire Tribeca posted an online review, in which she claims that a male masseuse had inappropriately touched her during a massage. (NYSCEF 152). The sales and public relations manager for Aire S.L. reviewed the incident, emailed the author of the review, and received no response. No further action was taken. (NYSCEF 130).

II. ALLEGED INCIDENT AND ITS AFTERMATH

On March 28, 2014, plaintiff and her boyfriend went to Acqua Tribeca for massages. Plaintiff testified at her deposition that after spending time in the spa's pools, they were escorted

into a massage room (NYSCEF 131), and changed out of their bathing suits. Seker massaged plaintiff, touching her in private areas without her consent. Plaintiff did not react or complain to Seker or her boyfriend, who was being massaged next to her. (NYSCEF 123).

Following the massage, plaintiff changed back into her bathing suit and returned to the spa's pools. After leaving the pools, plaintiff complained to the spa's general manager that Seker had touched her in an inappropriate, sexual manner. (NYSCEF 123). Notwithstanding Seker's denials, he was fired a few hours later (NYSCEF 127), and on May 1, 2014, he was arrested and subsequently indicted for the unauthorized practice of massage therapy and sexual abuse in connection with plaintiff's massage. (NYSCEF 142). On April 14, 2015, Seker pleaded guilty to one count of attempted unlicensed massage. (NYSCEF 164).

On May 31, 2016, plaintiff filed the instant complaint in which she advances causes of action for negligence, battery, assault, intentional infliction of emotional distress, and negligent infliction of emotional distress. (NYSCEF 119).

By affidavit, dated September 7, 2018, one of Seker's former employers states that he was never contacted by anyone about Seker, but that had he been, he would have disclosed that he had fired Seker after a client complained that he had touched her in a sexual manner. (NYSCEF 148).

III. MOTION TO STRIKE SUR-REPLY (SEQUENCE FIVE)

Aire defendants' motion was originally returnable on August 31, 2018 (NYSCEF 117), and by stipulation, dated August 14, 2018, the parties agreed to extend the return date to September 28, 2018 (NYSCEF 137). Plaintiff's designation of October 22, 2018 as the return date for its cross-motion (NYSCEF 138) is a nullity, as a cross motion must be made returnable on the same date as the original motion (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75, 87

[1st Dept 2013]). Therefore, all papers were to be submitted in Part 130 by September 28, 2018, the return date.

Nevertheless, on October 22, 2018, without leave of the court, plaintiff filed sur-reply papers. (NYSCEF 169-171). As "papers are not accepted after the return date unless on the consent or order of the court" (Part 12 Rule III[A]), plaintiff's sur-reply submission is untimely and is not considered.

IV. MOTION AND CROSS MOTION FOR SUMMARY JUDGMENT (Mot. seq. four)

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposition. (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

A. Aire defendants' motion (NYSCEF 117-136)

As plaintiff concedes that Aire defendants cannot be held vicariously liable for Seker's conduct, the issue is not addressed.

1. Corporate liability

a. Aire defendants' contentions

Defendants Aire S.L., Baths S.L., and Acqua Inc. contend that they cannot be held liable

for the incident at Acqua NY, given the lack of a connection between them and Acqua Tribeca.

b. Plaintiff's opposition

Plaintiff asserts that the non-New York defendants do not establish that they may not be held liable, as the CEO's affidavit is "inconsistent and incomprehensible," and the connection between "Aire Ancient Baths Group," of which he claims to be CEO and Director General, and Aire defendants is unknown. Moreover, the testimony of the spa's general manager provides evidence of his connection to Acqua Tribeca.

Moreover, during discovery, plaintiff claims, Aire defendants responded to demands on behalf of all four entities, and never denied possession of documents on the ground that they had no involvement with Acqua Tribeca. Moreover, in a magazine interview, the CEO identified himself as the director and co-owner of the spa, with the expectation of employing 50 part-time and 50 full-time employees (NYSCEF 160), and in another interview, he stated that he had opened the spa (NYSCEF 161). The CEO was never made available for a deposition, even though plaintiff agreed to conduct the deposition in Spain.

c. Aire defendants' reply

Claiming that plaintiff offers no evidence that the non-New York entities had control over employment decisions at Acqua Tribeca, Aire defendants also observe that there is no proof that they were involved with it in any manner apart from the general manager's business relations with the CEO and the director of marketing of the corporate group. They also allege that Acqua NY hires and fires its own employees and has its own human resources department, and that Seker interacted only with Acqua NY's hiring staff. Moreover, all paychecks for employees of Acqua Tribeca, including the general manager, are from Acqua NY.

d. Analysis

A member of a limited liability company may not be held liable for the company's conduct solely by virtue of its membership (*Matias ex rel. Palma v Mondo Properties LLC*, 43 AD3d 367, 367 [1st Dept 2007]), unless it is shown that it exercised "complete domination and control over the corporation" (*Grammas v Lockwood Assocs., LLC*, 95 AD3d 1073, 1075 [2d Dept 2012], quoting *E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 16 NY3d 775, 776 [2011]).

Aire defendants rely entirely on the CEO's affidavit as evidence that Acqua NY was not controlled by the other defendants. While the CEO states that "Acqua Ancient Baths, Inc." does not exercise control, the defendant named here is "Acqua Ancien Bath, Inc.," and he refers to Acqua Tribeca simultaneously as "Acqua Ancien Bath New York, LLC" and "Aire Ancient Baths New York," without distinguishing them. Moreover, despite the parties' reference to the "Spanish" or "non-New York" entities, one of the defendants, Acqua Ancien Bath, Inc., also referenced as "Acqua Ancient Baths, Inc." in the CEO's affidavit, is a New York entity.

Accordingly, in light of the confusion raised by Aire defendants' contradictions concerning their identity and corporate structure, they fail to meet their *prima facie* burden of establishing a lack of control or domination over the management of Acqua Tribeca.

In any event, even if Aire defendants had met their burden, triable issues are raised based on evidence that the spa's general manager reported to the CEO, whom he identified as the CEO and director of marketing for the entire Aire corporate group, and the CEO's claim in the magazine interviews that he opened the spa and would be hiring employees for it.

2. Negligent hiring

a. Aire defendants' contentions

Aire defendants deny liability for negligent hiring as Seker's conduct was unforeseeable and they claim that there is no evidence that their background check revealed any negative information about him, much less a propensity for sexual misconduct. Moreover, even if they had failed to conduct a background check, they cannot be held liable absent knowledge of Seker's propensity for sexual misconduct and absent a duty to inquire whether a prospective employee has been previously convicted of a crime.

Seker's lack of a license, they assert, is irrelevant as it was not the proximate cause of the alleged sexual assault. Rather, the assault was an intentional act, committed without notice or warning. They also allege that the prior instance of sexual assault reported online was committed by a licensed massage therapist, not Seker, who was fired immediately after the incident.

b. Plaintiff's opposition

Plaintiff argues that Aire defendants are not entitled to summary judgment for negligent hiring and retention as they had constructive knowledge of the risks in hiring Seker, and had they contacted his references, they would have learned of his history of sexual misconduct. She maintains that Aire defendants had a duty to take reasonable care in hiring, training, and supervising their massage therapists.

Relying on the statement of Seker's former employer, plaintiff disputes defendants' claim that a background check was performed. She also refutes the senior massage therapist's testimony that the previous sexual assault at an Aire spa was committed by someone other than Seker, absent any indication that she had personal knowledge thereof. Plaintiff also observes that the massage therapist had testified that she had heard a rumor that Seker had been the subject of

a previous allegation of inappropriate touching, and that she had not heard any rumors concerning other employees. She relies on the similarity of the other client's complaint of inappropriate touching with her complaint, and their timing as tending to prove that Seker was the prior assailant, and thus, at a minimum, Aire defendants had notice that one of their employees presented a risk of engaging in improper client contact, but took no action to prevent future incidents.

c. Aire defendants' reply

Defendants argue that plaintiff fails to raise an issue of fact, as lack of a license is not a reason for additional background checks, and, moreover, a background check would not have revealed Seker's alleged prior sexual misconduct. Additionally, her allegations about the prior complaint and their investigation are speculative.

d. Analysis

An employer may be held liable for negligent hiring where it places an "employee in a position to cause foreseeable harm, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee." (*Sheila C. v Povich*, 11 AD3d 120, 129 [1st Dept 2004]). A cause of action for negligent hiring requires a showing that an employer knew, or should have known, of the employee's propensity for the conduct which caused plaintiff's injury. (*Id.* at 129-130). Although an employer does not have a general duty to check whether a prospective employee has been convicted of a crime (*Yeboah v Snapple, Inc.*, 286 AD2d 204, 205 [1st Dept 2001]), a duty to investigate a prospective employee's background exists when an employer knows of facts that would lead a reasonably prudent person to investigate (*T.W. v City of New York*, 286 AD2d 243, 245 [1st Dept 2001]). A reasonable investigation need not consist only of a criminal

background check, but may include checking references. (*See e.g.*, *Andersen v Suska Plumbing*, 246 AD2d 475 [1st Dept 1998] [issue of fact existed as to whether employer breached duty by failing to check employee's references]).

As Aire defendants knew before they hired Seker that he had no massage therapy license, and absent any indication that they had inquired into it despite his prior unlicensed employment in that capacity at two other local spas, which constitutes a felony (Education Law §§ 6512 and 7802), they fail to demonstrate that they knew of no facts that would lead a reasonably prudent person to investigate further, and that they thus had no duty to investigate Seker's background. (*Compare Boadnaraine v City of New York*, 68 AD3d 1032 [2d Dept 2009] [defendant met *prima facie* burden as to negligent hiring claim through proof that when employee was hired, he was state-licensed and registered nurse, with two favorable references from previous employers]).

Even if Aire defendants had met their *prima facie* burden, Seker's lack of a license and history of criminal unauthorized practice of massage therapy creates an issue of fact as to whether they should have inquired further about his background. (*See e.g.*, *Chuchuca v Chuchuca*, 67 AD3d 948, 950 [2d Dept 2009] [newspaper delivery driver's lack of license created issue of fact as to negligent hiring]; *cf Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 163 [2d Dept 1997], *cert denied* 522 US 967 [1997], *lv dismissed* 91 NY2d 848 [1997] [no duty to investigate prospective church employee who had favorable letter of reference from Archbishop]).

Thus, for example, in *T.W. v City of New York*, the Court held that where an employee sexually assaulted an infant plaintiff, a reasonable jury could have concluded that the defendant had a duty to conduct an investigation into the employee's background where the employee

admitted to having a prior criminal conviction. The Court deemed it not dispositive that the conviction was unrelated to sexual violence, "as it cannot be said that, as a matter of law, it is unforeseeable that a person with convictions for assault would commit a sexual assault when placed in a setting" with children. (*Supra*, 286 AD2d at 245).

And in *Doe v Goldweber*, the Court determined that a seven-month gap in an employee's work history should have raised a red flag as to potential disciplinary problems thus giving rise to a duty to investigate, especially as an investigation would have revealed his disciplinary history, including a suspension from the practice of medicine. The Court observed that an employer may be held liable for negligent hiring "even if the injury committed was not identical to the prior injury." (112 AD3d 446, 447 [1st Dept 2013]; *see also Chichester v Wallace*, 150 AD3d 1073 [2d Dept 2017] [triable issue as to negligent hiring raised by fact that employee's application for employment included gap in employment, and that investigation would have revealed suspension from work for another agency]).

A duty to investigate further arises from the nature of Seker's work as a massage therapist, which gave him access to and an ability to interact with and touch nude or semi-nude people and touch. (*See e.g., Brandt v Elghanayan*, 242 AD2d 240 [triable issue as to negligent hiring raised as female plaintiff showed that defendants placed single man, "knowing nothing about him and making no apparent effort to obtain references," in apartment in same building as plaintiff's apartment with permission to be in her apartment to make repairs]).

Although the hiring of unlicensed massage therapists presents a risk of improper sexual conduct and massage therapy businesses are thus taught to obtain and confirm licensing information, verify professional references, and review the prospective employee's history of complaints, here, Aire defendants did not none of that and hired Seker despite his lack of a

license. (*See Corbally v Sikras Realty Co*., 161 AD2d 107 [1st Dept 1990] [question of fact raised as to hiring of employee without even routine background check as questions existed related to employee's immediate prior employment and circumstances surrounding his termination there]; *cf Travis v United Health Svces. Hosp., Inc*., 23 AD3d 884 [3d Dept 2005] [defendant met burden of establishing reasonable care in hiring employee as it had screening procedures in place which it used to hire employee and that procedures were in accord with accepted practice, and no irregularities or negative information was revealed during hiring process]).

Moreover, a check of Seker's references would have revealed at least the prior employer's termination of him due to an allegation of sexual misconduct by Seker and a possible propensity to engage in such misconduct in the future. (*T.W.*, *supra*, 286 AD2d at 245 [investigation would have revealed employee's extensive criminal record]; *compare K.I. v New York City Bd. of Educ*., 256 AD2d 189 [1st Dept 1998] [negligent hiring claim dismissed as background check would not have revealed propensity to molest minors]).

Having failed to establish that they were under no duty to investigate Seker's background, Aire defendants do not demonstrate that they should not have known of Seker's propensity for sexual misconduct and, therefore, fail to sustain *prima facie* their burden of proving that they may not be held liable for negligent hiring.

3. Negligent infliction of emotional distress

a. Aire defendants' contentions

Aire defendants argue that the cause of action for negligent infliction of emotional distress fails as defendants created no circumstance which would endanger or cause her to fear for her physical safety, especially as she remained in the spa for more than an hour after the alleged assault, and Seker's intentional acts were the only acts that endangered plaintiff, over

which Aire defendants had no control. Absent a duty to plaintiff and a breach of that duty, defendants assert that plaintiff's claim for negligent infliction of emotional distress must be dismissed.

b. Plaintiff's opposition

Dismissal of plaintiff's claim for negligent infliction of emotional distress is not warranted absent any requirement that plaintiff experience extreme and outrageous conduct. That plaintiff stayed in the spa after the massage is immaterial given Aire defendants' apparent argument "that [p]laintiff's reaction to her sexual assault was insufficient and not the way she should have responded" is improperly based on an outmoded gender-based attitude.

c. Aire defendants' reply

Even if extreme and outrageous conduct is not a requirement for negligent infliction of emotional distress, the claim is reserved for limited circumstances not present here. Moreover, defendants breached no duty to plaintiff, as required for a negligent infliction claim.

d. Analysis

Although it is unclear whether outrageous and extreme conduct is required for a claim for negligent infliction of emotional distress (*see Kornicki v Shur*, 132 AD3d 403, 403 [1st Dept 2015] [affirming dismissal of claim where the plaintiff filed to allege outrageous and extreme conduct]; *cf Taggart v Costabile*, 131 AD3d 243, 255 [2d Dept 2015] ["notwithstanding case law to the contrary, extreme and outrageous conduct is not an essential element of a cause of action to recover damages for negligent infliction of emotional distress"], *citing Ornstein v New York City Health & Hosps. Corp.*, 10 NY3d 1 [2008]), the claim requires the plaintiff to show that the defendant breached a duty owed to the plaintiff which unreasonably endangered the plaintiff's physical safety or caused the plaintiff to fear for her own safety (*Sheila C.*, 11 AD3d at 130).

Aire defendant's denial that they created any danger which threatened plaintiff's physical safety or caused her to fear for her safety is based solely on plaintiff's having remained in the spa after the alleged assault. They offer no support for the proposition that plaintiff's decision to remain establishes a lack of danger as a matter of fact or law. They thus fail to meet their *prima facie* burden.

B. Plaintiff's cross motion

1. Timeliness

a. Aire defendants' contentions

Aire defendants maintain that for the purposes of their summary judgment motion, "the Aire [d]efendants implicitly concede duty and breach," and that as plaintiff raises different issues in her cross motion, the motion should be denied as untimely.

b. Analysis

A cross motion for summary judgment may be considered, despite having been made after the expiration of the deadline for dispositive motions and absent good cause, where it seeks nearly identical relief sought in the original, timely motion. (*Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co.*, 104 AD3d 446, 449 [1st Dept 2013], quoting *Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006], *lv dismissed* 9 NY3d 862 [2007]).

Aire defendants seek summary judgment on all of plaintiff's causes of action, whereas plaintiff seeks partial summary judgment on the issues of duty and breach for all causes of action asserted against them. Thus, the motions concern "nearly identical" issues. (*See Brill & Meisel v Brown*, 113 AD3d 435, 435 [1st Dept 2014] [motion court properly decided defendants' untimely cross-motion seeking dismissal of same claims on which plaintiff timely sought summary

judgment]; *Alonzo*, 104 AD3d at 449 [motion court properly decide plaintiff's untimely "mirror-image" cross motion]; *cf Guallpa v Leon D. DeMatteis Const. Corp.*, 121 AD3d 416, 420 [1st Dept 2014] [court properly denied defendants' cross motion seeking dismissal of Labor Law § 200 claim, where plaintiff's timely motion sought summary judgment on Labor Law §§ 240(1) and 241(6) claims]). That plaintiff seeks partial summary judgment on the issues of duty and breach does not render the motions dissimilar, especially as defendants' motion addresses the same issues of duty and breach.

However, as plaintiff's spoliation motion substantively differs from Aire defendants' motion for summary judgment, it is not considered. Accordingly, plaintiff's cross motion is considered solely to the extent that it seeks partial summary judgment for duty and breach related to her claim of negligent hiring.

2. Negligence *per se*, special duty, and negligence

a. Plaintiff's contentions

Plaintiff asserts that she is entitled to partial summary judgment on her negligence claim as to Aire defendants' duty and breach of that duty. She claims that in negligently hiring and retaining Seker, Aire defendants unlawfully employed an unlicensed massage therapist in violation of the Education Law, and are thus negligent *per se*. Plaintiff contends that although a violation of the Education Law does not establish negligence *per se* for Seker individually, it does for Aire defendants. In addition, having undertaken her custody and limited her capacity for self-protection, Aire defendants owed her a special duty.

In support, plaintiff submits an expert affidavit from the Dean of Massage Therapy for the Swedish Institute in New York, who states that massage therapists are subject to licensing requirements and undergo training regarding proper draping techniques and the avoidance of

clients' genitalia. Moreover, as the hiring of an unlicensed massage therapist presents a risk of improper touching, massage therapy businesses are taught to obtain and confirm licensing information, verify professional references, and review the prospective employee's history of complaints, and the Education Department's guidelines prohibit "manipulation of the genital areas" and require respect of clients' "boundaries with regard to privacy, exposure, emotional expression, beliefs and reasonable expectations of professional behavior." (NYSCEF 158).

Even if not negligent *per se*, plaintiff maintains that Aire defendants are negligent as a matter of law, as a failure to check references that would reveal malicious propensities of an employee constitutes evidence of negligent hiring, and a reasonable investigation of Seker's employment history would have revealed that he had been fired for the same conduct alleged by plaintiff, and there is no evidence that Aire defendants conducted a background check.

Their negligence is also reflected in their "consistent" hiring of unlicensed massage therapists, failure to review previous allegations of inappropriate contact with clients, and lack of training materials and policies. Thus, even if not liable for negligent hiring, Aire defendants are liable for failing to supervise and train their employees, including Seker.

b. Aire defendants' opposition

Aire defendants argue that plaintiff's cross motion should be denied, as the hiring of an unlicensed massage therapist does not constitute negligence *per se*, and plaintiff fails to show that her injury would not have occurred if Seker had been properly licensed. Aire defendants deny a duty to perform a background check, and, as Seker had no criminal record, a background check would have revealed nothing. Moreover, they owed plaintiff no special duty arising from their massage therapy business.

c. Analysis

i. Negligence *per se*

To establish negligence *per se*, the movant must establish violation of a state statute that imposes a specific duty on the defendant (*Elliott v City of New York*, 95 NY2d 730, 734 [2001]), and is intended to protect a particular class of individuals (*Nicholson v S. Oaks Hosp.*, 27 AD3d 628, 629 [2d Dept 2006]).

Plaintiff relies on Education Law § 7802, which provides that only persons specifically licensed may practice massage therapy and that no one may advertise massage services unless such services are performed by licensed massage therapists, and she concedes that a violation of this statute does not constitute negligence *per se* as to an individual who practices massage therapy without a license. Aire defendants' advertisement of the services of an unlicensed massage therapist also does not constitute negligence *per se* as the statute does not set forth a specific standard of care for such services or relate to the manner of practicing massage therapy, and plaintiff cites no authority to support this claim.

Education Law § 6512, which pertains to individuals who are unlicensed, or persons who aid and abet "three or more unlicensed persons," is inapplicable absent any proof that Aire defendants hired more than one unlicensed massage therapist.

Therefore, plaintiff's claim that Aire defendants' conduct constituted negligence *per se* related to her negligent hiring claim is unsupported as a matter of law, and thus, subject to summary dismissal. (CPLR 3212[b] [if it appears that party other than movant entitled to summary judgment, court may grant judgment without necessity of cross motion]; *see also Doe v Spa*, 2003 Lexis 974 [Sup Ct, Nassau County 2003] [where plaintiff alleged she was touched inappropriately by spa's unlicensed massage therapist, court dismissed plaintiff's claim that spa's

violation of education law prohibiting unlicensed therapists was negligence *per se*]).

ii. Special duty

A special duty may be imposed upon an entity which has taken custody of another, depriving that person of their normal power of self-protection. (*See Pratt v Robinson*, 39 NY2d 554, 560 [1976], citing Restatement [Second] of Torts § 320 [school owes special duty to students because it has physical custody over them and deprives them of protection of parents/guardian]). A special duty arises when one in the custody of another cannot protect himself or herself. For example, a person's imprisonment "prevents a prisoner from avoiding attacks by flight" and "precludes the possession of any self-defensive weapons." (Restatement [Second] of Torts § 320, Comments *b* and *c*). Thus, a special duty is imposed in limited circumstances. (*E.g., Sanchez v State of New York*, 99 NY2d 247, 252 [2002] [prisons]; *Garcia v City of New York*, 222 AD2d 192, 194 [1st Dept 1996], *lv denied* 89 NY2d 808 [1997] [schools]).

Here, plaintiff fails to demonstrate that Aire defendants took custody of her in any manner, or that she was unable to protect herself, and she cites no authority for the proposition that a special duty may be imposed in the circumstances at issue here. As a special duty did not arise here as a matter of law, plaintiff's claim of negligence based on a special duty is unsupported. (CPLR 3212[b]).

iii. Negligence

To establish, *prima facie*, that Aire defendants were negligent in hiring Seker, plaintiff must show that they knew or should have known that he had a propensity to inappropriately touch clients. As it is undisputed that Seker had no license, and that Aire defendants knew that he lacked a license when they hired him, plaintiff demonstrates that there were facts known to Aire defendants that may have caused a reasonably prudent person to investigate. (*See supra*,

IV.A.2.d).

However, plaintiff fails to sustain her burden of proving here that Aire defendants did not conduct a background check, as the evidence offered by the parties is equivocal. That one of Seker's previous employers was not contacted by Aire defendants does not demonstrate that no background check was conducted, and plaintiff bears the burden here. As plaintiff bears the burden, it is of no moment that Aire defendants do not prove that they conducted a background check. (*See Roman v Hudson Tel. Assocs.*, 15 AD3d 227, 228 [1st Dept 2005] [no need for opposing party to offer evidentiary proof where moving party fails to meet initial burden]).

iv. Corporate liability

While plaintiff raises a triable issue as to whether all of the named defendants may be held liable here, she does not establish, *prima facie*, which defendants or defendants, other than Acqua NY, were sufficiently involved with the management or control of Acqua Tribeca to hold them liable for the spa's alleged negligent actions.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that Aire defendants' motion for summary judgment and plaintiff's cross motion for partial summary judgment are denied except that plaintiff's negligence claim premised on negligence *per se* and a special duty is dismissed solely to that extent (motion seq. 4); and it is further;

ORDERED, that Aire defendants' motion to strike plaintiff's reply memorandum is granted (motion seq. 5), and the reply memorandum is stricken and not considered.

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4/4/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

	☐	GRANTED	☐	DENIED	☐	GRANTED IN PART	☒ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE