

<b>Buccellato v North Cove Yacht Harbor Mgmt. Corp.</b>
2007 NY Slip Op 30271(U)
March 12, 2007
Supreme Court, New York County
Docket Number: 0114991
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JOAN A. MADDEN

PRESENT.

J.S.C.

PART 11

Index Number : 114991/2003

BUCCELLATO, VICTOR

vs

NORTH COVE YACHT HARBOR MGMT.

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on 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 consolidated for determination with motion sequence no. 007 and the consolidated motions are determined in accordance with the annexed decision and order.*

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

FILED

MAR 16 2007

NEW YORK COUNTY CLERK

Dated: March 12, 2007

J.S.C.

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 11

-----X  
VICTOR BUCCELLATO and DOROTHEA BUCCELLATO,

Plaintiffs,

INDEX NO. 114991/03

-against-

NORTH COVE YACHT HARBOR MANAGEMENT CORP.,  
LIBERTY LANDING MARINA, LLC, LIBERTY PARK  
WATER TAXI, BATTERY PARK CITY AUTHORITY,  
ROBERT J. PENNINGTON, SEA DEVIL FISHING CO.,  
HARBOR FERRY, LLC, LIBERTY LANDING  
MANAGEMENT, LLC, and WATERMARK  
ASSOCIATES, INC.,

Defendants.

-----X  
JOAN A. MADDEN, J.:

Motion sequence numbers 006 and 007 are consolidated for disposition.<sup>1</sup>

In this action for damages for personal injuries, defendants Liberty Landing Marina LLC, Liberty Park Water Taxi, Harbor Ferry LLC, Robert J. Pennington and Sea Devil Fishing Co., are moving for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as against each of them. Except as to the motion of of defendant Liberty Park Water Taxi, plaintiffs oppose the motions.<sup>2</sup>

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<sup>1</sup>By an order dated October 19, 2006, the separate motion for summary judgment by defendant Battery Park City Authority (motion sequence no. 005), was granted, and the complaint and all cross-claims by and against such defendant were dismissed.

<sup>2</sup> The only other party responding to the motions is defendant Liberty Landing Management, LLC, by submitting a 1½ page attorney's Affirmation in Partial Opposition. The affirmation merely states that Liberty Landing Management LLC "denies any liability to the plaintiffs or to any co-defendants on their cross-claims," "is not responsible for the co-defendants' acts" of negligence as alleged by plaintiffs which at a "bare minimum" raise genuine issues of material fact, and that Liberty Landing Management LLC "does not take any position

The accident underlying this action occurred on June 4, 2002, at approximately 6:30 a.m., when plaintiff Victor Buccellato was a passenger on a ferry known as the Sea Devil, which had traveled from Jersey City, New Jersey to lower Manhattan, where it was docked at North Cove Marina in Battery Park City. Plaintiff alleges that he slipped and fell as he was disembarking from the ferry, which required him to step down two to four inches from the side of the boat, onto the landing of a staircase that was located on a floating dock. Specifically, plaintiff testified that he stepped first with his right foot onto the landing and then, as he stepped with his left foot onto the landing, he slipped on wetness and fell on the landing and down the stairs. Plaintiff alleges that it was drizzling at the time and that no one was stationed on the landing of the staircase to assist passengers off the ferry.

According to plaintiffs, defendant Battery Park City Authority owns North Cove Marina and leased it to defendant Watermark Associates; Watermark then contracted with defendant Liberty Landing Management, LLC to manage the marina. Defendants explain that after the terrorist attacks of September 11, 2001, commuter traffic between lower Manhattan and New Jersey was severely disrupted. As a result, the New York Mercantile Exchange, where plaintiff worked, contacted defendant Liberty Landing Marina, LLC, to arrange for ferry service for New Jersey residents working at the Mercantile Exchange. According to defendants, since Liberty Landing Marina did not have an available vessel, defendant Harbor Ferry, LLC entered into a time charter agreement to hire the vessel known as the Sea Devil, which is owned and operated by defendants Sea Devil Fishing Co. and Robert J. Pennington; on the day of the accident, Pennington was the captain of the Sea Devil. The agreement provided for the Sea Devil “to be

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with respect to the remaining aspects of the co-defendants’ motions.”

used in the capacity of a ferry, running Mondays through Fridays, from Liberty State Park Marina in New Jersey to and from North Cove Marina in New York.”

Five of the nine named defendants are now moving for summary judgment dismissing the complaint. In the absence of opposition, the motion is granted and the complaint is dismissed as to defendant Liberty Park Water Taxi.

Neither Liberty Landing Marina nor Harbor Ferry is entitled to summary judgment. The record before the court is insufficient to eliminate any potential liability on the part of such defendants. In support of the motion, defendants submit no affidavits by the parties, and rely solely on the parties’ deposition testimony, documentary evidence and an expert’s affidavit. Defendants submit the deposition of Bruce Boyle, who is a principal of three named defendants, Liberty Landing Marina, Liberty Landing Management and Harbor Ferry. Defendants also submit the depositions of defendant Robert Pennington and plaintiff Victor Buccellato, and a small portion of the deposition of Adam Tierney on behalf of Liberty Landing Marina.

The parties’ deposition testimony is inconclusive at best, and at times inconsistent, especially since Bruce Boyle had an ownership interest in both Liberty Landing Marina and Harbor Ferry (two of the defendants moving for summary judgment), as well as Liberty Landing Management (a defendant who is not moving for summary judgment), and he testified with respect to all three of his entities. Boyle testified that Liberty Landing Marina operated a marina in Jersey City, New Jersey which had nothing to do with chartering the Sea Devil, or managing or operating North Cove Marina in Manhattan. Pennington, on the other hand, testified that Liberty Landing Marina placed a wooden platform on the top of the staircase where plaintiff fell. Pennington, however, also testified that he contacted Captain Bruce Davis of Harbor Ferry, when

he received a complaint from a passenger about disembarking at North Cove Marina, and that Davis “sent down” a crew with the platform and “screwed it to the set of stairs.”

Moreover, while Harbor Ferry asserts that its “sole involvement” arises from its chartering the Sea Devil, and that pursuant to the terms of the time charter agreement, operation of the vessel “rested in the hands of the captain,” both Boyle and Pennington testified that Harbor Ferry would be contacted if a problem arose with passengers safely disembarking from the vessel. Boyle testified that if Pennington came “across a situation which he felt might present a danger to passengers disembarking,” Boyle would have expected Pennington make a request to him in his capacity “as Liberty Landing Management, but actually it could be Harbor Ferry, LLC, too.” Pennington, however, testified that he was not aware of the entity known as Liberty Landing Management, and that he was familiar with only Liberty Landing Marina and Harbor Ferry. Pennington further testified that in April 2002, during the first week he was operating the Sea Devil as a ferry between New Jersey and Manhattan, a woman passenger complained about disembarking and “stepping down in her high heels” at North Cove Marina. Pennington said he then contacted Captain Bill Davis at Harbor Ferry and suggested that a platform be built on top of the staircase, so that it would be level with the bulwark or outside wall of the boat. Boyle confirmed that Davis was a captain who worked for Harbor Ferry and knew Pennington, and that “[w]e maybe even found Pennington through Bill [Davis].” Pennington testified that after he witnessed plaintiff’s accident, he notified Captain Bill Davis from Harbor Ferry. Boyle and Pennington also testified that Harbor Ferry provided a crew member for the Sea Devil, Neil “Narine,” who was paid by Harbor Ferry.

Based on the foregoing sworn testimony, the evidentiary proof in the record indicates that

both Harbor Ferry and Liberty Landing Marina were involved in maintaining the area where plaintiff fell while he was disembarking from the ferry, specifically the staircase on the dock provided as the means for Sea Devil passengers to disembark from the vessel. Summary judgment, therefore, is denied as to such defendants.

Summary judgment is also denied with respect to defendants Robert J. Pennington and Sea Devil Fishing Co. The record establishes that triable issues of fact exist as to whether, as the owner of the vessel, they breached the duty to provide passengers with a reasonably safe means of disembarking.<sup>3</sup> See Kermarec v. Campagnie Generale Transatlantique, 358 US 625, 632 (1959); Forrester v. Ocean Marine Indemnity Co., 11 F3d 1213 (5<sup>th</sup> Cir 1993); Moore v. Phillips Petroleum Co., 912 F2d 781, 792 (5<sup>th</sup> Cir 1990); Tittle v. Aldacosta, 544 F2d 752, 755 (5<sup>th</sup> Cir 1977). Pennington testified that on each trip, two crew members were on board the vessel, and one would stand on the platform on top of the staircase and the other would stand on the boat to assist passengers on or off the boat as necessary. Plaintiff testified that on the date of the accident, crew members were stationed on the boat in the area as he was getting off, but he

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<sup>3</sup>Plaintiff argues that the Sea Devil was a common carrier and as such had a duty to provide passengers with a safe place to “alight” from the boat. Defendants assert that the Sea Devil was not a common carrier since it was privately chartered for employees of the Mercantile Exchange and was not available to the public. The court need not determine whether the Sea Devil qualifies as a common carrier, since the duty of a common carrier with respect to disembarking or alighting passengers does not differ in any significant degree from the duty of a vessel owner, as noted above. See e.g. Bethel v. New York City Transit Authority, 92 NY2d 348, 356 (1998) (common carrier subject to same duty of care as any other tortfeasor which is reasonable care under all of the circumstances); Hayes v. City of New York, 34 AD3d 208 (1<sup>st</sup> Dept 2006) (cruise ship’s duty as a common carrier terminated on passenger’s safe disembarkation from vessel); Malawer v. New York City Transit Authority, 18 AD2d 293, 294-295 (1<sup>st</sup> Dept 2005)(common carrier owes duty to passengers to stop at place where they may safely disembark and leave the area).

specifically said that no one was stationed on the landing on top of the staircase where he fell. Plaintiff submits an expert's affidavit stating, *inter alia*, that in his opinion "the area where plaintiff alighted the boat presented a safety hazard that was unreasonably dangerous and could have been remedied if defendants had exercised more care. . . . [H]aving personnel stationed near alighting passengers was not sufficient. There should have been a practice and procedure in place where it would be required that the passengers be held by the elbow as they alighted the boat. Merely having employees nearby, and not actively assisting passengers, was as useful as them not being there at all."

Also, at his deposition, plaintiff Victor Buccellato viewed photographs of the dock with the staircase at North Cove Marina and noted that staircase as depicted in the photographs had been altered since his accident in June 2002, as the "box on top . . . to raise it up" was not there. Plaintiff also testified that in order to get from the boat onto the staircase, he had step down two to four inches and "[t]hat's why that box was built." Such testimony directly contradicts Pennington's testimony that the platform on top of the staircase which made the top of the stairs level with the side of the boat, was added prior to June 2002.

In view of plaintiff's testimony and the expert's affidavit as to the unsafe means for disembarking from the Sea Devil, triable issues of fact exist as to whether Pennington and Sea Devil Fishing Co. provided reasonably safe means for plaintiff to disembark at North Cove Marina. Such defendants, therefore, are not entitled to summary judgment.

Accordingly, it is hereby

ORDERED that the motion for summary judgment (Motion Sequence No. 006) by defendants Liberty Landing Marina, LLC, Liberty Park Water Taxi and Harbor Ferry, LLC is

granted only to the extent of dismissing the complaint as against defendant Liberty Park Water Taxi, and the motion is denied as to defendants Liberty Landing Marina, LLC and Harbor Ferry, LLC; and it is further

ORDERED that the motion for summary judgment (Motion Sequent No. 007) by defendants Robert J. Pennington and Sea Devil Fishing Co. is denied; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on April 12, 2007 at 2:00 pm, in Part 11, Room 351, 60 Centre Street.

DATED: March 12, 2007

ENTER:

  
J.S.C.

**FILED**  
MAR 16 2007  
NEW YORK  
COUNTY CLERK'S OFFICE