

Stevens v Malinowski
2007 NY Slip Op 33284(U)
September 25, 2007
Supreme Court, Suffolk County
Docket Number: 0012357/2004
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-15-07
ADJ. DATE 7-24-07
Mot. Seq. # 007 - MD

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ALEXANDRA STEVENS, an infant under the age of fourteen (14) years, by her mother and natural guardian, THERESA STEVENS and THERESA STEVENS, individually,	: SANDERS, SANDERS, BLOCK, et al.
	: Attorneys for Plaintiff
	: 100 Herricks Road
	: Mineola, New York 11501
Plaintiffs,	:
- against -	:
THOMAS MALINOWSKI,	: JOHN P. HUMPHREYS, ESQ.
	: Attys for Deft/3rd Party Pltf Malinowski
	: 3 Huntington Quadrangle, Suite 102S
Defendant.	: P.O. Box 9028
-----X	: Melville, New York 11747
THOMAS MALINOWSKI,	: WILSON, ELSER, MOSKOWITZ, et al.
	: Attys for 3 rd Party Deft Spellmans Marine
	: 3 Gannett Drive
- against -	:
	: White Plains, New York 10604-3407
SPELLMANS MARINE,	:
Third-Party Defendant.	:
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Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13 - 18; Replying Affidavits and supporting papers 19; Other 20; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant, Thomas Malinowski, for an order granting summary judgment dismissing the complaint of plaintiffs, Alexandra Stevens and her mother Theresa Stevens, is denied.

Plaintiffs commenced this action to recover damages allegedly suffered by the infant plaintiff, Alexandra Stevens, on July 10, 2002, when Alexandra was a passenger on a boat owned by defendant. On that date, Alexandra and the defendant's daughter requested that defendant take them out on his boat. Defendant complied and took the two girls and his son out into the Great South Bay, eventually stopping the boat so that the girls could jump off the boat and swim in the water. Alexandra jumped off

the boat and swam around two or three times, re-entering the boat by climbing up a ladder that was attached to the rear of the boat, next to the outboard engine. On her last attempt to enter the boat, Alexandra lost her balance and fell into the water. Within seconds thereafter, Alexandra's leg came in contact with the propeller on the boat's engine, causing her to suffer the injuries complained of herein. Plaintiffs instituted this action against defendant, alleging, among other things, that defendant was negligent in failing to comply with the safety manual of the water craft, failing to possess the proper training to operate the boat, failing to properly supervise Alexandra, in failing to properly position the propeller, in failing to warn Alexandra about the dangers presented by the sharp propeller blade, in failing to assist Alexandra in getting up the ladder, and in failing to ensure that the ladder was safe and suitable.

Defendant now moves this court for an order granting summary judgment dismissing plaintiffs' complaint and precluding the plaintiffs from offering evidence from an expert on liability. The defendant has agreed¹ to withdraw the latter part of his motion. In regard to that part of his motion which seeks summary judgment, defendant argues that it was not the fall from the ladder which was the injury producing event, rather it was caused by Alexandra disregarding prior warnings and swimming too close to the propeller after she fell from the ladder. Furthermore, defendant argues, by knowingly going out boating and swimming Alexandra assumed the risk of getting injured in this manner. Finally, defendant states he breached no duty to Alexandra in failing to assist her up the ladder and that even assuming he should have offered assistance, the intervening act of the wave hitting the boat and Alexandra's own choice to return to the boat via a route that brought her too close to the propeller, were unanticipated acts that break any nexus between defendant's purported negligence and the injuries suffered by Alexandra.

Plaintiffs oppose the defendant's summary judgment motion, arguing defendant was aware that wave activity made it difficult to traverse the ladder yet no one on the boat offered any assistance to Alexandra and that it was the fall from the ladder that precipitated the accident. Moreover, plaintiffs state that they have retained an expert, who has offered the opinion that defendant failed to discharge his duties as the owner of the boat in that he failed to properly warn the infant plaintiff about the dangers associated with the propeller and re-entering the boat via the ladder, that he failed to continuously supervise Alexandra while they were swimming and re-boarding the boat and that he failed to offer assistance to Alexandra when she was climbing the ladder. These cumulative failures, plaintiffs argue, were the proximate cause of Alexandra's injury.

In reply, defendant argues, again that Alexandra's injuries were not caused by Alexandra's fall from the ladder and therefore any failure on defendant's part to lend assistance is irrelevant. Further, defendant points out that the infant plaintiff had experience boating and swimming from boats and knew that the propeller was sharp and dangerous. Therefore, defendant states, there was no necessity to warn Alexandra of the dangers of which she was already aware.

¹In opposition to defendant's motion, plaintiffs indicate defendant has agreed to withdraw that portion of his motion which seeks to preclude plaintiffs' use of any expert testimony. By letter dated, September 6, 2007, defendant's counsel acknowledges he agreed to withdraw that portion of his motion.

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The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NYS2d 1062, 601 NYS2d 463 [1993]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Until the burden is met, the opponent of the motion is under no burden to make an evidentiary showing to raise a triable issue of fact (*Romano v St. Vincent's Medical Center*, 178 AD2d 467, 577 NYS2d 311 [1991]). Failure of the movant to make the required showing mandates a denial of the motion regardless of the sufficiency of the opposing papers (*JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 795 NYS2d 502 [2005]). Moreover, it is well settled that the remedy of summary judgment is appropriate only where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. The competing contentions of the parties must be viewed in a light most favorable to the party opposing the motion (*Marine Midland Bank, NA v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [1990]).

It is fundamental that to recover damages in a negligence action, plaintiff must establish that the defendant owed plaintiff a duty to use reasonable care, that the defendant breached that duty, and that a resulting injury was proximately caused by the breach (*see, Tercet v Fell*, 68 NYS2d 432, 510 NYS2d 49 [1986]). The primary assumption of the risk doctrine, relieves defendants such as ones in the case at bar of liability “when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks...[A] premises owner continues to owe ‘a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty.’” (*Morgan v New York*, 90 NY2d 471, 484, 662 NYS2d 421, 426 [1997] quoting, *Turcotte v Fell*, 68 NY2d 432, 439, 510 NYS2d 49 [1986]). “If a participant makes an informed estimate of the risks involved in the activity and willingly undertakes them, then there can be no liability if he is injured as a result of those risks” (*Turcotte*, 68 NY2d at 437, 510 NYS2d 49, 54). A participant’s background, skill and experience are factors which must be considered to determine his or her level of awareness of the risk and participants will not be deemed to have consented, however, to risks which are concealed, not assumed or unreasonably increased. (*Conner v Tee Bar Corp*, 302 AD2d 729, 755 NYS2d 489 [2003]; *De Lacy v Catamount Development Corp.*, 302 AD2d 735, 755 NYS2d 484 [2003]; *Lamey v Foley*, 188 AD2d 157; 594 NYS2d 490 [1993]).

Here, viewing the evidence in a light most favorable to plaintiffs, defendant has not established, as a matter of law that no negligence on his part caused the infant plaintiff’s accident. According to Alexandra’s deposition testimony, neither defendant nor his son offered her any assistance when she was climbing the ladder to get back on the boat. The defendant has offered no evidence that it would not have been feasible to lend aid to Alexandra, nor whether a wave hitting the boat and knocking her off balance was an unexpected occurrence. Moreover, while defendant paints a picture of Alexandra falling into the water and then choosing to swim back to the boat via a route which took her too close to the propeller, Alexandra’s deposition testimony and affidavit asserts that she was resurfacing immediately after her fall when the accident occurred. Consistent with its role as issue finder, the court declines to split hairs at this juncture to determine at what precise second the infant plaintiff’s knee was sliced open by the propeller blade. Furthermore, while Alexandra may indeed have had some experience boating and may have known of the dangers associated with wave

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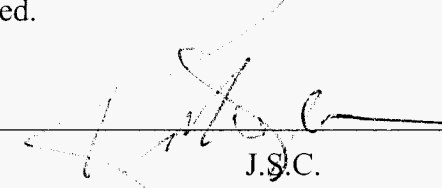
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activity and swimming too close to the engine, it is unclear at this juncture what the breadth of her knowledge was at the time of the accident. Therefore, the court is precluded from determining, as a matter of law, that the infant plaintiff possessed the requisite knowledge necessary to assume the risks associated with boating and swimming in the open water.

Based on the aforementioned, defendant's motion for an order granting him summary judgement dismissing the complaint of plaintiffs is denied.

Dated: SEP 25 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION