SUPREME COURT - STATE OF NEW YORK

Present:
HON. ARTHUR M. DIAMOND
Justice Supreme Court

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FRANK GENTILELLA and GINA GENTILELLA

Plaintiff,

-against-

STEVEN MONTOYA and MARYANNE MONTOYA JOSEPH MINERVA, LISA MINERVA, CHARLES VELLA, MAUREEN VELLA, EDWARD MULATO and DONNA MULATO

Defendant.

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TRIAL PART: 21
NASSAU COUNTY

INDEX NO: 011899/05

MOTION SEQ. NO:2-7

SUBMIT DATE: 3/28/08

The following papers having been read on this motion:

Notice of Motion..... 1
Cross-Motions..... 2-5
Opposition(Plaintiffs).....6
Opposition(Montoya).....7
Oppostion(Mulato).....8
Reply(Kessler).....9,10
Reply(Mulato).....11,12
Reply (Mulato).....13,14
Reply (Montoya).....15,16
Reply (Vella).....17
Reply (Minerva).....18
Reply (Plaintiffs).....19-21

Before the Court are two motions and four cross-motions which request the following various forms of relief:

Defendants Edward and Donna Mulato move this Court for the following forms of relief: [1] an order pursuant to CPLR §3025[b] granting leave to serve an Amended Verified Answer to plaintiff's supplemental summons and complaint and deeming said Amended Answer to have been properly and timely served; [2] an order pursuant to CPLR §§3211, 3212 for an order dismissing the plaintiff's action; [3] an order pursuant to CPLR §3211[a][7] for an order dismissing the plaintiff's Supplemental Summons and Complaint dated September 6, 2005 for failing to state a cause of action upon which relief can be granted (Sequence #002).

Defendants Joseph and Vicki Kessler **cross-move** pursuant to CPLR §3212

for an order granting summary judgment dismissing the plaintiff's complaint in it's entirety, as well as any and all cross-claims asserted against them (Sequence # 003).

Defendant's Charles and Maureen Vella **cross-move** pursuant to CPLR §3212 for an order granting summary judgment and dismissing the plaintiff's complaint as well as any and all cross-claims asserted against them (Sequence #004). Defendant's Steven and Maryanne Montoya **cross-move** pursuant to CPLR §§3211(a)(7), 3212 for an order granting summary judgment dismissing the plaintiff's complaint (Sequence #005).

Defendant's Joseph Minerva and Lisa Minerva move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the plaintiff's complaint (Sequence #007)

The plaintiff's Frank and Gina Gentilella, **cross-move** for an order granting leave to amend their complaint to specifically allege willfulness (Sequence #006).

Cause of Action:

The underlying action, sounding in negligence, was commenced by the plaintiff, Frank Gentilella, for injuries sustained on October 20, 2002 when he and Steven Montoya, his brother in law and co-defendant herein, were bow hunting for deer on a 120 acre piece of property located on Rural Route 8 in Deposit, New York.

As amplified in the plaintiff's Verified Bill of Particulars, the plaintiff's cause of action is predicated upon the negligence of the co-defendants with respect to installing, constructing and maintaining a tree stand the plaintiff was directed to use by defendant Montoya and from which the plaintiff fell. Due to this negligence, the tree stand was rendered ". . . defective and dangerous in that the railings thereof were old and dilapidated, defective, insufficient and rotten, giving way and causing the plaintiff to fall the ground." (*see* Plaintiff Verified Bill of Particulars at item 5). The property upon which this accident occurred is owned collectively by all of the co-defendant's herein named.

Plaintiff's Deposition Testimony:

The Court begins it inquiry as to the matters herein raised with an examination of the plaintiff's deposition testimony.

Plaintiff testified that on October 20, 2002 he was in Deposit, New York bow hunting for deer, with co-defendant Steve Montoya (Plaintiff's Deposition Transcript at pp.9-11). He states that the land upon which he was hunting was owed collectively by all the co-defendant's herein named

(*Id.* at p. 12). The plaintiff had hunted on this parcel of land on one prior occasion in October of 2001 (*Id.*). During the hour between 5:00 and 6:00 a.m he ascended into a tree stand he believed to be built by defendant's Steven Montoya and Joseph Kessler (*Id.* at pp. 16,23). He stated that he came to use that stand after defendant Montoya stated that "I'll take you the Little Joe's Stand", so named because it was used primarily by Joseph Kessler (*Id.* at p. 24). The stand was about twelve feet high and consisted of ". . . a platform made out of pressure treated lumber with wood limbs for a railing" which were "cut and erected" and surrounded the platform (*Id.* at p.12, 15, 20). Upon further clarification, the plaintiff stated that these wood limbs were actually "tree limbs" measuring "a couple inches around" which were "nailed to other limbs on the tree" (*Id.* at pp. 15, 19). The plaintiff climbed the tree and left his hunting bow on the ground below which was thereafter hoisted up to the tree stand by way of a rope affixed to the bow (*Id.* at p. 18). He states that he was positioned in the tree stand "on my knees and I was going to stand up" (*Id.* at p. 34). He further states that he placed his left hand on the railing and ". . . was in the process of pulling my bow up when I leaned on the rail and it just snapped. And my weight, I just, you know, I just fell out" (*Id.* at p. 20).

Summary Judgment Motions submitted by the named Co-Defendants

Co-defendants Kessler move for summary judgemnt pursuant to CPLR §3212 seeking dismissal of the plaintiff's complaint in addition to any and all cross-claims which have been asserted against them. The Vella co-defendants, who are similarly moving for summary judgment pursuant to CPLR §3212, and the Montoya co-defendants who are moving for dismissal of the complaint pursuant to CPLR §§3211[a][7] and 3212, both rely upon the legal arguments as set forth in the affirmation of counsel for the Kessler defendants and counsel for the Mulato defendants.

Co-defendants Edward and Donna Mulato move for an order pursuant to CPLR §§3211 [a][7] and 3212 for an order dismissing the plaintiff's supplemental summons and Complaint.[1]

Co-defendant's Joseph and Lisa Minerva made pursuant to CPLR §3212 dismissing the plaintiff's complaint and any and all cross-claims asserted against them.

In support of their respective applications, all of the moving co-defendant's argue that by operation of the General Obligations Law §9-103 the defendant's are immune from liability. Given that this particular statute is integral to all the applications, the Court will initially refer to the terms

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[1] These moving co-defendants also move for an order seeking leave to amend their verified answer to include a defense predicated upon General Obligations Law §9-103 and that the plaintiff's supplemental complaint fails to state a claim upon which relief can be granted.

thereof.

The Applicable Statutory Scheme:

General Obligations Law §9-103 and the provisions therein embodied state the following, in pertinent part:

> **No duty to keep premises safe for certain uses; responsibility for acts of such users**
>
> 1. Except as provided in subdivision two,
>
> a. an owner, lessee or occupant of premises . . . owes no duty to keep thepremises safe for entry or use by others for hunting . . . or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes;
>
> b. an owner, lessee or occupant of premises who gives permission to another to pursue any such activities upon such premises does not thereby (1) extend any assurance that the premises are safe for such purpose, or (2) constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.

The defendants assert that the plaintiff was engaged in hunting on a piece of land particularly suitable for said activity and that as a result, the aforementioned statute expressly grants immunity to these co-defendants. The defendant's rely principally upon the plaintiff's above-referenced deposition testimony wherein he testified that he was hunting at the time of the accident and upon the deposition testimony of several of the named co-defendants wherein they individually stated that the subject property is a 120 acre parcel in upstate New York which was purchased strictly for the purposes of hunting (*see* Deposition of Steven Montoya at pp. 7,8,73; Deposition of Joseph Minerva at pp. 8,9,10; Deposition of Charles Vella at p. 7).

Additionally, counsel for the defendants argues that while the plaintiff may have stated a case against the defendants sounding in ordinary negligence, such is patently insufficient to dissolve the protection of immunity afforded to the defendants by operation of the statute. In order to neutralize the immunity bestowed, counsel argues that the plaintiff must demonstrate that any actions undertaken by the defendant's were willful.

Plaintiffs Opposition to the Applications submitted by the Co-Defendants

In opposing the various applications interposed herein, counsel for the plaintiff sets forth

different arguments relative to each.

As to the application interposed by the Minerva defendants, counsel argues that inasmuch as their application seeks dismissal based upon General Obligations Law §9-103 and given that said defense was not plead as an affirmative defense in the answer, the application should therefore be denied (*see* Obiol Affirmation in Opposition to Minerva's Cross-Motion at ¶¶14-16)

With regard to the application interposed by the remaining co-defendant's, counsel for the plaintiff initially argues that they have failed to demonstrate their *prima facie* showing to entitlement to judgment as a matter of law (*Id.* at ¶18). Counsel asserts that the moving defendant's have totally ignored General Obligations Law §9-103[2][b] and have ". . . not presented any evidence whatsoever as to whether or not consideration was provided by Mr. Gentilella in regard to his use of the land." (*Id.* at ¶20).

Further, counsel argues that there are questions of fact as to the willfulness of the actions undertaken by co-defendant Montoya (*Id.* at ¶30). Positing the contention most central to the plaintiff's theory of the case counsel forwards that co-defendant Montoya was possessed of knowledge, both positive and affirmative, with respect to an existing defective condition relative to the railings surrounding the subject tree stand, and notwithstanding such knowledge directed the plaintiff to use this tree stand without any warning (*Id.* at ¶¶25,30).

Counsel further assets that while it was solely defendant Montoya who directed the plaintiff to use the tree stand, all of the remaining co-defendants are jointly and severally liable under the provisions of CPLR§1602 [2] (*Id.* at ¶24).

Annexed to counsels affirmation is the sworn affidavit of Frank Gentilella, the plaintiff herein. The plaintiff avers that on the morning of the hunt Steven Montoya took him to ". . . Joe Kessler's tree stand . . . " (*see* Frank Gentilella's Affidavit at ¶4). He states that he ". . . had never seen this tree stand before and did not know where it was located (*Id.* at ¶5). The plaintiff states that ". . . Mr. Montoya directed me to use a tree stand. . . " and subsequently while on the tree stand ". . . a railing snapped causing me to fall approximately twelve feet to the ground causing me to sustain two fractured vertebrae."(*Id.* at ¶¶7,9).

The plaintiff additionally avers that when Mr. Montoya returned after the accident ". . . he was upset that I had fallen and indicated that although he had repaired the platform of the tree stand within a year he did not get around to replacing the railings, although he had intend to, because they were old and rotten."(*Id.* at ¶11). He states that "Mr. Montoya retrieved a piece of the broken railing which upon further inspection was rotted" (*Id.* at ¶12). The plaintiff finally states that it is his recollection that the hunting trip in issue was ". . . extended to repay various business services which I provided to Mr. Montoya in connection with his construction business and for which I was never

paid" (*Id.* at ¶14). The plaintiff specifically remembers ". . . a bathroom job which I preformed [sic] for Mr. Montoya in Oceanside approximately one month prior to this hunting trip." (*Id.* at ¶15).

Discussion and Analysis:

The legislature, recognizing the importance of having natural environments in which New Yorkers can recreate, promulgated General Obligations Law §9-103 so as to encourage owners of suitable lands to make them open and available to the public (*Ferres v City of New Rochelle*, 68 NY2d 446 [1986]). In analyzing the statute and the legislative intent infusing the provisions thereof, the Court of Appeals has expressed the following: "New Yorkers need suitable places to engage in outdoor recreation; more places will be available if property owners do not have to worry about liability when recreationists come onto their land." (*Bragg v Genesee County Agricultural Society*, 84 NY 544, 550 [1994]).

However, in order for a particular case to fall within the ambit of General Obligations Law §9-103 and for the immunity to therefore be available to defendant landowners, the nature and characteristics of the property upon which the accident occurred must be such that they render the land suitable for the activity in which the injured party was engaged when the accident occurred (*Bragg v Genesee County Agricultural Society*, 84 NY 544 [1994], *supra*; *Ianotti v Consolidated Rail Corp.*, 74 NY2d 39 [1989]). Such an inquiry as to whether a particular piece of land is suitable and if, as a result, the immunity is available, is a question of statutory interpretation and thus a question of law to be determined by the Court (*Bragg v Genessee County Agricultural Society*, 84 NY2d 544, *supra*; *see also Moscato v Frontier Distributing Inc.*, 254 AD2d 802 [4th Dept 1998]).

In making such a determination, the Court must inquire whether the defendant's land is the kind of parcel ". . . which is not only conducive to the particular activity or sport but is also a type which would be appropriate for public use in pursuing the activity as recreation."(*Albright v Metz*, 88 NY2d 656 [1996] *quoting Iannotti v Consolidated Rail Corporation*, 74 NY2d 39[1989], *supra*). Among the various factors that the Courts considered is whether the particular parcel in issue has been utilized in the past for the same recreational activities which are present in the case currently being adjudicated (*see Moscato v Frontier Distributing, Inc.*, 254 AD2d 802 [4th Dept 1998]).

The immunizing effect conferred by the statute is limited in scope and will not function to absolve a landowner of liability for acts or omissions which are demonstrated to be willful or malicious (General Obligations Law §9-103[2][a]). Immunity is also not available upon a showing that ". . . permission to pursue any of the activities enumerated in this section was granted for a consideration . . . " or where the individual granted permission to use the property injures another, to whom the landowner owes a separate duty of care (General Obligations Law §9-103[2][b] [c]). Directly relevant to the application of these exceptions, the Court of Appeal has held that "The

exception 'must be strictly construed in order that the major policy underlying the legislation itself is not defeated,' with all doubts resolved in favor of the general provision rather than the exception" (*Farnham v Kittinger*, 83 NY2d 520 [1994], quoting McKinney's Cons. Laws of NY, Book 1, Statutes §213).

Standard for Summary Judgment

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d [1957]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidence, in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Giuffrida v Citibank Corp.,* 100 NY2d 72 [2003]). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient and to defeat the application the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]).

Within the particular context of the case *sub judice*, the moving defendant's herein bear the burden of demonstrating their *prima facie* entitlement to judgment as a matter of law with regard to whether the immunizing effect of the General Obligations Law §9-103 is applicable to the extant facts and circumstances (*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065). In order to meets this burden, it is incumbent upon the moving defendants to demonstrate their ownership of the subject property and that the plaintiff was injured thereon while engaged in one of the activities enumerated in the statute (*Bragg v Genessee County Agricultural Society*, 84 NY2d 544 [1994], *supra*). Additionally, as recently stressed by the Appellate Division, the moving party must also demonstrate that the land upon which the accident occurred was one suitable for the particular recreational activity in which the plaintiff was participating (*Morales v Coram Materials Corporation*, 2008 WL 669813 [2d Dept 2008]).

If the moving defendants demonstrate the statutes applicability, the burden shifts to the plaintiff who must overcome a "high-threshold demonstration" and illustrate, through competent evidence, that one of the statutory exceptions exist so as to preclude the defendant's from availing

themselves of the statutory immunity. Any negligence on the part of the defendant's is considered immaterial [*Sega v State*, 60 NY2d 183 [1983]; *Ferres v City of New Rochelle*, 68 NY2d 446 [1986]; *Farnham v Kittinger*, 83 NY2d 520 [1994], *supra*).

In the instant matter, the defendant's have met their burden of demonstrating their *prima facie* entitlement to judgment as a matter of law (*Sillman v Twentieth Century Fox*, 3 NY2d [1957], *supra*; *Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065[1979], *supra*). It is undisputed that the co-defendants herein own the land in question and that when the plaintiff was injured, he was engaged in one of the activities enumerated in the statute, to wit: hunting (*Morales v Coram Materials Corporation*, 2008 WL 669813 [2d Dept 2008], *supra*). Additionally, the suitability of the property is clear. The subject land upon which the plaintiff was present was a 120 acre parcel in rural upstate New York, which was purchased and used by the co-defendant exclusively for the purposes of hunting (*Iannotti v Consolidated Rail Corporation*, 74 NY2d 39[1989], *supra*). Moreover, the deposition testimony of the plaintiff himself demonstrates that this land has been used for this very purpose in the past (*Moscato v Frontier Distributing, Inc.*, 254 AD2d 802 [4th Dept 1998], *supra*). Inasmuch as the defendants have demonstrated their entitlement to relief, the burden now shifts to the plaintiff to raise a triable issue of fact through the introduction of competent evidence (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003], *supra*).

As an initial matter, the Court notes that contrary to the contention of counsel for the plaintiff, General Obligations Law §9-103 is not an affirmative defense which must be plead in the answer (*Ferres v City of New Rochelle*, 68 NY2d 446 [1986], *supra*). Additionally, counsel mistakenly argues that a component of the moving defendant's *prima facie* burden is a proffer of evidence probative as to whether or not consideration was provided by the plaintiff to the defendant. Such is not the current state of the law and rather it is incumbent upon the plaintiff, assuming the defendant has met their initial burden, to come forth with evidence of consideration to defeat the defendant application for summary judgment (*Morales v Coram Materials Corporation*, 2008 WL 669813 [2d Dept 2008], *supra*).

The Court now turns to substance of the plaintiff' argument offered in opposition. By way of the his proffered affidavit, the plaintiff claims, *inter alia*, that the railing surrounding the tree stand which snapped and caused him to fall was retrieved by defendant Montoya who examined it and proclaimed it to be "rotted" (*see* Frank Gentilella's Affidavit at ¶12). He further claims that defendant Montoya told him that he had intended to replace the railings because they were "old and rotten" (*Id.* at ¶11).

The Court in construing the evidence in a light most favorable the moving party, finds that

the plaintiff has failed to raise a triable issue of fact. Upon a careful reading of the examinations before trial, nowhere in the deposition testimony of either the plaintiff or defendant Montoya are there any statements therein contained that defendant Montoya found the railing to be "rotten" upon a post-accident inspection. Additionally, the plaintiff did not testify that defendant Montoya stated that he intended to replace the railings as a result of their rotten condition.

Given what are clear material departures between the plaintiff's statements as adduced during his examination before trial and those averments contained in his recent affidavit, such affidavit is insufficient to raise a triable issue of fact and defeat the co-defendants motions for summary judgment (*see Lara v Saint John's University*, 289 AD2d 457 [2001]; *Sanchez v City of New York*, 305 AD2d 487 [2d Dept 2003]).

Moreover, even assuming *arguendo*, competent evidence was presented demonstrating that the railing was indeed rotted, this, without more, would be legally insufficient to bring the case at bar outside of the scope of General Obligations Law § 9-103 (*Sega v State*, 60 NY2d 183 [1983], *supra*). Mere evidence of the defendant's negligence does not neutralize the immunizing effect of the statute and rather, it is the plaintiff who must put forth evidence to demonstrate that one of the statutory exceptions is applicable (*Morales v Coram Materials Corporation*, 2008 WL 669813 [2d Dept 2008], *supra*).

In this case, it is the plaintiff's position that co-defendant Montoya actions were willful inasmuch as he knew before the accident occurred that the subject tree stand was in a compromised condition and nonetheless purposely directed him to use said stand. When positing such a contention, the actions undertaken by an owner ". . . must be based upon a showing of particular, not inferred malice and willfulness, and not on simple negligence (*Farnham v Kittinger*, 83 NY2d 520 [1994], *supra*).

In the instant matter, the plaintiff, while predicating his charge of willfulness on defendant Montoya's prior knowledge, has not provided proof to support this claim. There is an absence in the record, of any evidence from which it may be particularly demonstrated that any of the named defendants had *a priori* knowledge of any alleged defect or dangerous condition attendant to the subject tree stand.

As to the plaintiff's claims that there was consideration given to defendant Montoya in exchange for this hunting trip, the Court finds this argument to be equally unavailing. Specifically, the plaintiff asserts that he had done some construction work relative to a bathroom in the home of defendant Montoya, and this hunting expedition was a form of remuneration in exchange therefor (*see* Frank Gentilella's Affidavit at ¶¶14,15) However, there is a dearth of evidence, either documentary or testimonial, as to the particulars of the work done, the value of goods and services

attendant thereto, or with respect to the substance of the purported agreement between the plaintiff and defendant Montoya surrounding this alleged proffer of consideration in exchange for the hunting trip in issue.

Based upon the foregoing, the motions by all the named co-defendant's made pursuant to CPLR §3212 seeking summary judgment dismissing the plaintiff's complaint together with all of the cross-claims asserted against them are hereby GRANTED.

In consideration of this Court decisions granting summary judgment to all of the named co-defendants, the plaintiff's cross-motion for an order granting leave to amend their Complaint to specifically alleged Willfulness **and** the motion by co-defendant's Edward and Donna Mulato for an order granting leave to amend their answer to include a defense of immunity pursuant to General Obligations Law § 9-103 and a defense that the plaintiff's complaint fails to state a cause of action upon which relief can be granted are all DENIED as moot.

This constitutes the decision and order of this Court.

DATED: April 21, 2008

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