

Smart v Mott

2008 NY Slip Op 33467(U)

December 17, 2008

Supreme Court, Nassau County

Docket Number: 4104/04

Judge: Antonio I. Brandveen

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

WILLIAM N. SMART, SUSAN SMART and
WILLIAM W. STANLEY,
Plaintiffs,

TRIAL / IAS PART 32
NASSAU COUNTY

Action No. 1

- against -

Index No. 4104/04

EDWARD A. MOTT, LAURENCE
SCHMELZINGER, ANITA SCHMELZINGER,

Motion Sequence No. 001, 004

Defendants.

EDWARD A. MOTT and CATHERINE P. MOTT,

Plaintiffs,

Action No. 2

- against -

Index No. 7122/04

LAURENCE SCHMELZINGER, ANITA
SCHMELZINGER and CEDARHURST YACHT
CLUB,

Defendants.

WILLIAM N. SMART, SUSAN SMART and
WILLIAM W. STANLEY,

Plaintiffs,

Action No. 3

- against -

Index No. 14140/05

EDWARD MOTT, LAURENCE
SCHMELZINGER and CEDARHURST YACHT
CLUB,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits. 1, 2
 Answering Affidavits 3
 Replying Affidavits 4
 Briefs: Plaintiff's / Petitioner's _____
 Defendant's / Respondent's 5

The defendant Cedarhurst Yacht Club moves for an order pursuant to CPLR 3212 for judgment as a matter of law, dismissing the plaintiffs' complaints and all cross claims. The defendants Lawrence Schmelzinger and Anita Schmelzinger cross move for an order pursuant to CPLR 3212 for judgment as a matter of law, dismissing the plaintiffs' complaints, granting the defendants Lawrence Schmelzinger and Anita Schmelzinger summary judgment based upon their property damage claim contained in the counterclaims, and cross claims against the plaintiff Edward Mott and the defendant Cedarhurst Yacht Club. The plaintiffs oppose the defense motion and cross motion on the ground there are material issues of fact regarding the defendants' negligence which require trial by jury. This Court has carefully reviewed all of the papers submitted with respect to the motion and cross motion.

The underlying consolidated action arises from an incident on September 6, 2002, at approximately 8:45 p.m., in Reynolds Channel, Town of Hempstead, County of Nassau, State of New York. The plaintiffs, in the other consolidated action, were passengers on board a 22-foot Aqua Sport owned and operated by Mott. The allegations indicate that shortly before the accident Mott, while cruising at approximately 15 miles per hour, turned the boat northeast to avoid a properly lighted, anchored fishing boat, and struck a 40 foot auxiliary sailing vessel, owned by the Schmelzingers, which was unlit, moored in an area of

Reynolds Channel which was not a U.S. Coast Guard designated special anchorage. The Schmelzingers claim they were moored there at the direction of the Cedarhurst Yacht Club which owned, maintained and chose the location of mooring.

The attorney for Cedarhurst Yacht Club states, in the supporting affirmation dated November 8, 2007, none of the plaintiffs are able to establish, even though discovery is complete, any fault nor neglect by the defendant Cedarhurst Yacht Club which proximately caused any of the plaintiffs' injuries. The attorney for Cedarhurst Yacht Club points to deposition testimony by the parties to support this defendant's assertions. The attorney for Cedarhurst Yacht Club points out Mott, who admitted consuming beer on board that day, violated several inland rules of navigation, including operating the boat in restricted visibility without a designated lookout; maneuvering it to port rather than to starboard while overtaking the boat fishing in Reynolds Channel; and operating the boat at too great a speed under those conditions. The attorney for Cedarhurst Yacht Club notes the unsworn report of the defense expert with respect to those assertions.

The attorney for Cedarhurst Yacht Club contends, in a supporting memorandum of law dated October 15, 2007, the governing law is the federal maritime law respect to the claims against Cedarhurst Yacht Club. The attorney for Cedarhurst Yacht Club argues, because the Schmelzinger vessel was stationary, this matter concerns an allision not a collision between two moving vessels. The attorney for Cedarhurst Yacht Club asserts the burden of proof in a collision case requires the plaintiff to establish the defense vessel was negligent, and that negligence was a proximate cause of the incident, but here the moving

vessel is presumed to be solely at fault for the incident. The attorney for Cedarhurst Yacht Club avers Mott struck a stationary vessel, and it is presumed Mott was solely negligent, and Mott's negligence proximately caused the allision, and the resulting circumstances. The attorney for Cedarhurst Yacht Club states Mott violated the applicable rules of navigation, so summary judgment should be granted to the defendant Cedarhurst Yacht Club. The attorney for Cedarhurst Yacht Club reasons when a vessel violates any of the inland rules of navigation, to wit rules of the road a party must not only prove the violation did not cause the incident, but the violation could not have caused it. The attorney for Cedarhurst Yacht Club postulates, while the plaintiffs may argue the Schmelzingers violated an inland rule, specifically Rule 30, by failing to use an anchor light, that did not proximately cause the outcome.

The attorney for the Schmelzingers states, in the supporting affirmation dated November 12, 2007, Lawrence Schmelzinger, who was member of the Cedarhurst Yacht Club, was instructed by a Cedarhurst Yacht Club representative months before the incident where to moor the boat, so he had no choice with respect to precise location. The attorney for the Schmelzingers indicates the anchor for the Schmelzingers vessel was provided by Cedarhurst Yacht Club. The attorney for the Schmelzingers contends there are no issues of fact regarding the defendants' negligence which require trial by jury. The attorney for the Schmelzingers asserts the Motts and Cedarhurst Yacht Club are liable to them for their property damage. The attorney for the Schmelzingers points to the parties' deposition testimony and federal law to support the Schmelzingers' assertions. The attorney for the

Schmelzingers avers the lack of an anchor light did not proximately cause the outcome, and notes Mott admitted he was unaware of where the anchor light would be located on the sailboat, and various shore lights and dock lights would have obscured Mott's view of the anchor light. The attorney for the Schmelzingers also indicates Mott testified he had no idea if the mooring just beyond the dock was a special anchorage; conceded he could not recall the last time looking at the chart for Reynolds Channel nor using the GPS navigation on this occasion.

Both attorneys for the Motts, as defendants and as plaintiffs on counterclaim state, in an opposing affirmation dated May 23, 2008, the Motts allege their vessel collided with the Schmelzingers' vessel because the Schmelzingers' vessel failed to display the proper lights for a vessel at anchor in violation of the inland navigation rules and all other applicable statutory norms governing navigation and safety. Both attorneys for the Motts state the Schmelzingers' vessel was attached to a permanent mooring owned by Cedarhurst Yacht Club which permitted the Schmelzingers to place their vessel anchor at that mooring without displaying the proper lights. Both attorneys for the Motts point out there is conflicting testimony regarding the visibility of the Schmelzingers' vessel at the time of the incident, and while there was some artificial lighting from shore, there is no evidence those lights illuminated the Schmelzingers' vessel. Both attorneys for the Motts aver the Court should take judicial notice there was a new moon on September 6, 2002, contrary to the assertions by the Schmelzingers and Cedarhurst Yacht Club. Both attorneys for the Motts note Edward Mott immediately prior to the incident saw an illuminated fishing boat

anchored in the channel; maneuvered to the left to pass it; and the impact with the Schmelzingers' vessel took place. Both attorneys for the Motts submit Edward Mott and his passengers, never saw any boats moored at the Schmelzingers' vessel position prior to the accident. Both attorneys for the Motts states, prior to the incident, Cedarhurst Yacht Club did not take any steps to determine whether the subject mooring area was a designated special anchorage, and advise members or anyone else using the moorings with the Club's permission that they should display lights at night. Both attorneys for the Motts, as defendants and as plaintiffs on counterclaim state, while the opposing side claimed the mooring had not been moved since the accident, the nonparty witness Thomas Pollard testified he observed the mushroom anchors of the mooring out of the water in 2002 after the accident. Both attorneys for the Motts, as defendants and as plaintiffs on counterclaim address implications of Edward Mott being impaired on the evening of the allision, and state that claim is without merit since there is no evidence of it. Both attorneys for the Motts, as defendants and as plaintiffs on counterclaim turn to the property damage claim of the Schmelzingers, and dispute the value of the vessel. Both attorneys for the Motts, as defendants and as plaintiffs on counterclaim challenge misstatements in the motion for summary judgment, and the unsworn report of the movants' expert, and argue the movants selectively pick legal rules and laws while ignoring other relevant provisions.

The attorney for the plaintiffs William N. Smart, Susan Smart and William W. Stanley, in the other consolidated matter, states, in an opposing affirmation dated May 23, 2008, they oppose the instant motion and cross motion. The attorney for the Smarts and

Stanley asserts these plaintiffs adopt the opposing affirmation submitted by counsel for the Motts. The attorney for the Smarts and Stanley avers the instant motion and cross motion should be denied.

Both attorneys for the Motts, as defendants and the attorney for the Motts as plaintiffs on counterclaim state, in a supplemental opposing affirmation dated June 2, 2008, Pollard testified on May 7, 2008, he observed the mushroom anchors of the mooring out of the water after the incident. Both attorneys for the Motts state he was not in possession of that testimony when this affiant's May 23, 2008 papers were served. Both attorneys for the Motts request consideration of this testimony in conjunction with the other evidence in the Motts' opposition papers dated May 23, 2008.

The attorney for the Schmelzingers reiterates, in a reply affirmation dated August 4, 2008, the contentions of the Schmelzingers, and remarks, based on the plaintiffs' testimony, there was sufficient lighting to observe Schmelzingers' stationary 40 foot sailing vessel. The attorney for the Schmelzingers points to the bay constable's report dated September 6, 2002, which indicates the weather was clear, and the water calm at the time of the allision. The attorney for the Schmelzingers asserts, based on Pollard's testimony, the lighting from the dock area illuminated the Schmelzingers' vessel at the time of the incident. The attorney for the Schmelzingers avers the purported weather report generated from the internet is not in admissible form, and cannot be considered as evidence. The attorney for the Schmelzingers states the Court should not take judicial notice of a new moon to rebut sworn testimony. The attorney for the Schmelzingers states the Schmelzingers' vessel was

always anchored at the same mooring during the sailing season. The attorney for the Schmelzingers repeats the Motts and Cedarhurst Yacht Club are liable to them for their property damage.

Under CPLR 3212 (b), a motion for summary judgment “shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party ... [T]he motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325; *Andre v Pomeroy*, 35 NY2d 361). Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v Village of Patchogue Fire Dept.*, 146 AD2d 572). Thus, the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelan v GTE Sylvania*, 182 AD2d 446). Here, in view of the applicable legal standards, plaintiffs’ causes of action can be sustained. The complaint must not be dismissed. The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395; *Gervasio v Di Napoli*, 134 AD2d 235, 236; *Assing v United Rubber Supply Co.*, 126 AD2d 590). Nevertheless, “ ‘the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated’ ” (*Gervasio v Di Napoli, supra*, 134 AD2d, at 236, quoting *Assing v United Rubber Supply Co., supra*; *see, Columbus Trust Co. v*

Campolo, 110 AD2d 616, *affd* 66 NY2d 701). If the issue claimed to exist is not genuine and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v Pomeroy*, 35 NY2d, *supra*, at 364; *Assing v United Rubber Supply Co., supra*). Here, the defendant Cedarhurst Yacht Club and the defendants Lawrence Schmelzinger and Anita Schmelzinger have demonstrated that, on the facts, they are entitled to judgment as a matter of law under CPLR 3212 (b). In opposition, the plaintiffs Edward Mott and Catherine P. Mott, and the plaintiffs Willima N. Smart, Susan Smart and William W. Smart have not shown facts sufficient to require a trial.

Accordingly, the motion and cross motion are granted in all respects.

So ordered.

Dated: **December 17, 2008**

ENTER:

J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED
 DEC 23 2008
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE